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No. .....

Supreme Court of the United States

OCTOBER TERM, 1953

NONLES PARNACHER, DEVET PARNACHER,
NANNIE PARNACHER, now Johnson,
and SALINA SCOTT,
Petitioners,

VERSUS

HOUSTON B. MOUNT,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETITION FOR WRIT OF CERTIORARI

The petitioners, Nonles Parnacher, Devet Parnacher, Nannie Parnacher, now Johnson, and Salina Scott, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in that certain case therein entitled, "Nonles Parnacher, Devet Parnacher, Nannie Parnacher, now Johnson, and Salina Scott, Appellants, vs. Houston B. Mount, Appellee," the same being case numbered 4637 in that court. The judgment of that court was entered October 30, 1953, and within twenty days thereafter, and within the time allowed by the rules of that court, petitioners filed therein a pe-

tition for rehearing, as permitted by the rules of that court, and such petition for rehearing was denied by the Court of Appeals on November 27, 1953. The decision has not yet been reported, but is shown in the printed transcript of record filed herewith (R. 93-100, 101-121).

OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit is set forth in the record at pages 93 to 100, inclusive.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1254 of Title 28, United States Code.

This petition is to obtain a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered October 30, 1953, affirming judgment for the defendant of the United States District Court for the Eastern District of Oklahoma, and, also, the order of the Court of Appeals, made on November 27, 1953, denying petitioners' petition for rehearing in that court, and this petition is presented pursuant to Section 5 of Rule 38 of the Rules of this Court, because of the importance of the questions presented, and petitioners claim that in its decision, the Court of Appeals has decided an important question of Oklahoma law in a way probably in conflict with applicable state court decisions, and that this case presents an important question of federal law (proper construction of Section 23 of the Act of Congress of April

26, 1906, 34 Stat. 137, 145, as amended by the Act approved May 27, 1908, 35 Stat. 312, 315), and that the decision of the Court of Appeals involves an erroneous application as precedent to the facts of this case of the decision of this Court in the case of *Angel* v. *Bullington*, 330 U.S. 183, and that the decision of the Court of Appeals is probably in conflict with applicable decisions of this Court in the holding of the Court of Appeals that the issues of this case involving assertion by petitioners of certain federal rights, are *res adjudicata* by reason of a certain decision of the Supreme Court of Oklahoma (*Parnacher et al.* v. *Mount*, 207 Okla. 275, 248 P.2d 1021), and that, by reason of such decision of the Court of Appeals, of which review is sought, petitioners may be deprived of property without due process of law, as petitioners are thereby denied any remedy as to the merits of their cause of action in this case, involving assertion of certain federal rights.

Petitioners say that even if the character of the reasons they urge in this case as justifying this Court in granting certiorari may not clearly exactly fit into any one of the examples of character of reasons which may be considered sufficient for granting of certiorari which are set forth in Section 5(b) of Rule 38 of the rules of this Court, the questions presented by this case are of such importance as to justify the granting of a writ of certiorari.

Certiorari may be granted on that ground. *Federal Trade Commission* v. *Raladam Co.*, 316 U.S. 149.

QUESTIONS PRESENTED

FIRST:

Whether a decision of the highest court of a State is *res adjudicata* in a suit in Federal Court as to rights claimed under laws of the United States which could have been asserted in a suit in the Federal Courts, where in the opinion of such State Court, such Court purportedly passed upon the merits of the controversy, but also held or recognized in its opinion that there was no remedy in the particular proceeding then pending before the State Court as to such rights, for lack of jurisdiction, although recognizing that the matter could be conclusively determined in a proper suit in the State Courts other than the proceeding then pending in such State Court?

SECOND:

(The first question stated in another way); in connection with the facts of this case:

Whether the rule of *res judicata* may apply to an opinion of the Supreme Court of a State, in a subsequent suit in Federal Court, where the Supreme Court of the State, in such opinion, recognized that from the nature of the proceeding then pending before it, the matter involved in the subsequent suit in Federal Court could not have been adjudicated in the particular proceeding then pending in the State Courts?

THIRD:

Specifically, where the purported decision of the Supreme Court of Oklahoma, of the point expressed in the first paragraph of the syllabus by that Court in the case of

Nonles Parnacher et al. v. *Houston B. Mount*, 207 Okla. 275, 248 P.2d 1021, which was an appeal from an order admitting a will to probate, is conclusive by way of estoppel or as *res judicata* in this suit to quiet title to restricted Indian land, in which it is asserted by petitioners that such will is ineffective as to restricted property because it was not properly approved in accordance with the requirements of Section 23 of the Act of Congress of April 26, 1906, 34 Stat. 137, 145, as amended by the Act of May 27, 1908, 35 Stat. 312, 315, although the Supreme Court of Oklahoma, in its opinion in that case recognized as the law the long settled rule in that State that such question presented by petitioners (plaintiffs) in this suit, COULD NOT HAVE BEEN LITIGATED OR ADJUDICATED IN THE TRIAL COURTS IN THAT PROCEEDING or lack of jurisdiction, although it may be determined in a suit to quiet title to the restricted property in the proper State Court of general original jurisdiction, and for that reason denied petitioners any remedy in that proceeding as to the matters complained of by them in this suit?

FOURTH:

If the above-stated question be answered in the negative, whether, the Act of a County Judge of the State of Oklahoma, in determining whether the will of a full-blood Indian of the Five Civilized Tribes in Oklahoma should be approved under Section 23 of the Act of Congress of April 26, 1906, 34 Stat. 145, as amended by Section 8 of the Act of May 27, 1908, 35 Stat. 315, is a judicial or *quasi judicial* act, involving the exercise of discretion, or only a ministerial act, and, whether, after such a will has been presented

to one such officer for approval, he has exclusive jurisdiction to determine whether it should be approved, and, whether, after such a will has been presented to one such official for his action of approval, and he has, in the exercise of discretion, determined that it should not be approved, and has refused to approve it, the same will may, thereafter be validly approved by another such officer, or whether it may be taken from place to place and to different officers given authority by the statute to approve such a will until one is found who will approve it, and thereby made valid as to restricted property?

FIFTH:

Specifically, as to the preceding question, whether the County Judge of Garvin County, Oklahoma, had jurisdiction to approve the will involved in this case, after such same will had been presented to the County Judge of Pontotoc County, Oklahoma, when it had been executed, for acknowledgment and approval, under said Federal Statute, and such County Judge of Pontotoc County, Oklahoma, had, in the proper exercise of the discretion and authority vested in him by said Act of Congress duly determined that said will should not be approved and had refused to approve it?

SUMMARY STATEMENT OF MATTERS INVOLVED

Liesiny McLean Walton was a full-blood Chickasaw Indian, duly enrolled as such opposite Roll Number 777 of the roll of Chickasaws by blood (R. 2, 22), and, by reason of her enrollment as a citizen of the Chickasaw Nation (Act June 28, 1898, 30 Stat. 495, sec. 11, 21; Act July 1, 1902,

32 Stat. 641, sec. 11, 27), there was allotted and patented to her certain land, the alienation of which, by her, was restricted by Acts of Congress (Act July 1, 1902, 32 Stat. 641, sections 11, 12, Act of April 26, 1906, 34 Stat. 137, sec. 19; Act of May 27, 1908, 35 Stat. 312, sec. 1; Act of May 10, 1928, 45 Stat. 495, sec. 1). She died February 12, 1949,while the owner of part of her restricted allotted land, and left as her heirs, the petitioners (plaintiffs in the trial court) (R. 2, 22). Petitioners, Nonles Parnacher, Devet Parnacher, and Nannie Parnacher now Johnson, are children of said Liesiny McLean Walton, deceased, and petitioner, Salina Scott, is a granddaughter of deceased, being the child of a predeceased daughter (R. 2, 22). The children are full-blood enrolled Chickasaw Indians, and the granddaughter is an unenrolled 7/8th blood Chickasaw Indian (R. 2, 22).

Shortly after her death, the respondent, Houston B. Mount, a white man of no relation to deceased, filed a petition in the County Court of Pontotoc County, Oklahoma, for probate of an alleged will of said deceased (R. 5). Under the terms of such will each of petitioners is to be given $5.00, and all the rest and residue of the property of deceased, including the restricted property which is the subject of this suit, is devised and bequeathed to the respondent (R. 12). The will was such a one as is required to be acknowledged before and approved by a United States Commissioner or a Judge of a County Court of the State of Oklahoma, in order to be valid or effective as to restricted property, under Section 23 of Act of Congress of April 26, 1906, 34 Stat. 137, as amended by Section 8 of Act of Congress of May 27, 1908, 35 Stat. 312. (*Davis* v. *Williford*, 271 U.S. 484). The will was dated August 28,

1945, and there was attached to it on a separate sheet, a certificate of acknowledgment before and approval by Sam J. Goodwin, County Judge of Garvin County, Oklahoma, dated September 18, 1945 (R. 13). Among other things the following statements in plaintiffs' complaint are unquestionably proved or undisputed (R. 4):

> "Plaintiffs allege that on the date of said will, to-wit: the 28th day of August, 1945, Moss Wimbish was the duly elected, qualified and acting County Judge of Pontotoc County, Oklahoma, and said Liesiny McLean, then Walton, was a resident of Pontotoc County, Oklahoma, and that said purported will was executed on said date in the presence of said County Judge of Pontotoc County, Oklahoma, at his office in the Pontotoc County courthouse in Ada, Oklahoma, and that, at that time, there appeared before said County Judge the purported testatrix, Liesiny Walton, same person as Liesiny McLean, then Walton, and the attesting witnesses on said will, Thomas Puller and Richard F. Colbert, and also, C. L. McArthur, an attorney who had drawn said will pursuant to an agreement with the defendant herein that he would pay said attorney's fee therefor, and the purported will was executed and signed by the witnesses under the supervision of said C. L. McArthur in the presence of said County Judge, so that said County Judge could then be informed of all of the circumstances surrounding the execution of said purported will, and, in order for it to be submitted to him for it to be acknowledged before him and for his action of approval or disapproval thereof, under said Federal statute (Section 23 of the Act of Congress of April 26, 1906, as amended by Section 8 of the Act of Congress of May 27, 1908); that, at that time, the said C. L. McArthur had attached

to said will, a sheet of paper containing a form for a certificate of acknowledgement and approval of said will, and when the purported will had been executed, and signed by the witnesses, said C. L. McArthur then requested said County Judge of Pontotoc County to sign such certificate and approve the said will, and submitted the same to him for his action of approval or disapproval, and, after examination by said County Judge of the purported testatrix through said attesting witnesses as interpreters, she being unable to speak the English language, but only the Chickasaw language, the said County Judge of Pontotoc County, Oklahoma, duly determined, in the lawful exercise of the discretion and authority vested in him by said Acts of Congress in view of all of the circumstances surrounding the execution of said will, and the matters which had induced the purported testatrix to execute the same by placing her thumb mark thereon, insofar as could be ascertained by said County Judge, that said purported will should not be approved, and then refused to approve said purported will, and refused to sign the certificate which said attorney had attached thereto for said County Judge to sign, * * * and, thereupon said C. L. McArthur secured the possession of said will, with the blank certificate attached thereto, which showed that said Liesiny Walton had appeared before said County Judge of Pontotoc County at that time, and carried the purported will and attached blank certificate from the office of said County Judge of Pontotoc County. * * *

"Plaintiffs further allege that from that time until the date of the death of said Liesiny McLean, then Walton, said purported will was in the possession of said attorney C. L. McArthur, and the defendant herein, and that plaintiffs had no knowledge thereof prior to the death of said Liesiny McLean, then Walton,

and, that, after the date of the death of said Liesiny McLean, then Walton, and on the 17th day of February, 1949, said purported will was filed in the County Court of Pontotoc County, Oklahoma, together with a petition by the defendant herein for it to be admitted to probate, and that when it was filed in said County Court, the blank certificate which said attorney had originally had attached to it, showing appearance of said Liesiny Walton before said County Judge of Pontotoc County, Oklahoma, on the * * * date of said will, was not attached to said will, but there was attached thereto on a separate sheet of paper a purported certificate of acknowledgment before and approval of said purported will by the County Judge of Garvin County, Oklahoma, which certificate had been purportedly executed by said County Judge of Garvin County, Oklahoma, on the 18th day of September, 1945, and, plaintiffs allege that after said purported will had been executed in the presence of the County Judge of Pontotoc County, Oklahoma, on the 28th day of August, 1945; and he had refused to approve it, said attorney C. L. McArthur, at the request of the defendant herein, and under an agreement with the defendant that he would pay the fee of said attorney therefor, and on the 18th day of September, 1945, without any notice to the plaintiffs, took said Liesiny McLean, then Walton, and said will which the County Judge of Pontotoc County had refused to approve, to Pauls Valley, Oklahoma, and secured * * * the purported certificate of acknowledgment and approval which was attached to said purported will when it was filed for probate after the death of said Liesiny McLean, then Walton; * * * that, * * * upon being informed by said County Judge of Garvin County, Oklahoma, that he would attempt to approve said purported will and would sign such a certificate, said attorney, C. L. Mc-

Arthur, detached from said purported will, the certificate thereon which he had originally prepared for the use of the County Judge of Pontotoc County, Oklahoma, and substituted therefor and attached to said purported will, the purported certificate of acknowledgment and approval of said purported will which was signed by said County Judge of Garvin County, Oklahoma" (R. 5, 6).

Plaintiffs' (petitioners') contention as to the effect of the purported approval of the will by the County Judge of Garvin County, after the County Judge of Pontotoc County had refused to approve it, is set forth in the complaint filed in this action in the United States District Court for the Eastern District of Oklahoma, as follows:

"Plaintiffs allege that the purported approval of said will by the County Judge of Garvin County, Oklahoma, was void, and added no validity to said purported will, for the reason that the County Judge of Garvin County, Oklahoma, had no jurisdiction or authority to approve the same for the purported will which the County Judge of Garvin County attempted to approve was the same will which had been submitted to the County Judge of Pontotoc County, Oklahoma, for his action of approval or of refusal to approve the same, and which said County Judge of Pontotoc County, Oklahoma, had refused to approve, * * * on the date of its execution, and who, after it had been submitted to him for his action, had exclusive jurisdiction of said matter as to whether it should have been approved or not * * *" (R. 7).

This contention is not answered by the opinion of the Court of Appeals in this case (R. 92-100).

In the proceeding to probate the will in the State Courts, the petitioners herein contested the will and the County Court of Pontotoc County, Oklahoma, refused to admit the will to probate, and respondent herein appealed from that decision to the District Court of Pontotoc County, Oklahoma, for *trial de novo*, on the issue as to whether the will should be admitted to probate, and that court, on August 29, 1949, rendered judgment that it be admitted to probate, and directed that upon the remand of the case to the County Court (the court of original probate jurisdiction), that respondent be issued letters testamentary without bond, as directed in the will (R. 75-88), but, as to the question whether the will had been validly approved so as to be effective as to restricted property, the State District Court held:

> "The court concludes that the approval and acknowledgment of the will of a full blood Indian required by the Act of April 26, 1906, 34 Stat. 137, Sec. 23, as amended by the Act of Congress of May 27, 1908, 35 Stat. 312, Sec. 8, is not an element of the execution and attestation contemplated by the statutes of Oklahoma, and is not within the purview of the jurisdiction of the County Court or this court on appeal in admitting the will to probate" (R. 85).

The petitioners herein, in their contest filed in the probate proceeding, mentioned the fact that the County Judge of Pontotoc County had refused to approve the will, and, that, thereafter, the proponent of the will (respondent herein), had obtained the purported approval of the will by the County Judge of Garvin County, Oklahoma, not, as a ground for contest of the probate of the will, but in pleading facts alleged to show that the execution of the alleged

will by the testatrix had been obtained by undue influence, a ground of contest of probate of a will (R. 78).

The ruling of the State District Court that there was no jurisdiction in the County Court, the court of original probate jurisdiction, or in the District Court, on appeal, in the proceeding for probate of the will, to determine whether the will was properly approved in accordance with the Act of Congress, so as to be effective to pass title to restricted Indian land, or other restricted property, was in accordance with the long-settled rule in the State of Oklahoma that such question cannot be determined in such proceeding, but can only be determined by suit to quiet title to the restricted property, or in ejectment, in the District Court of the State, the court of general original jurisdiction (even after admission of a will to probate), or in the proceeding for distribution of an estate, it not being a triable issue in the proceeding to probate a will. *Armstrong* v. *Letty*, 85 Okla. 205, 209 Pac. 168; *Lauderdale* v. *Tookolo*, 114 Okla. 187, 243 Pac. 587; *Phillips* v. *Smith*, 186 Okla. 636, 100 P.2d 249; *Williford* v. *Davis*, 106 Okla. 208, 232 Pac. 828, affirmed in *Davis* v. *Williford*, 271 U.S. 484.

Petitioners herein appealed from the judgment of the District Court of Pontotoc County, Oklahoma, that the will be admitted to probate to the Supreme Court of the State and that Court rendered a decision by an opinion filed on March 25, 1952, affirming the judgment of the State District Court that the will be admitted to probate, but petitioners' petition for rehearing in that Court was not overruled until September 30, 1952, and application for leave to file a second petition for rehearing was denied October 21, 1952. *Parnacher et al.* v. *Mount*, 207 Okla. 275, 248 P.2d

1021. The decision of the Supreme Court of Oklahoma did not become final on the issue as to whether the will should be admitted to probate or the mandate of that Court was not issued until the application for leave to file a second petition for rehearing was denied on October 21, 1952.

In the appeal in the Supreme Court of Oklahoma, petitioners did assert that the will was void as to restricted property, and that it should then be declared to be void as to restricted property, because not properly approved in accordance with the Act of Congress, and in the opinion of the Supreme Court of Oklahoma it was purportedly held that the will appeared to have been properly acknowledged before and approved by a County Judge of Oklahoma, and that the act of approving such a will is only a ministerial act, and that the fact that the County Judge of Pontotoc County had refused to approve the will did not render invalid the approval of it by the County Judge of Garvin County, and the following statement was included in the first paragraph of the syllabus by the Supreme Court of Oklahoma:

> "Sec. 23, Act of Congress of April 26, 1906, as amended by Act of May 27, 1908, 35 Stat. 312, providing that the will of a fullblood Indian, bequeathing restricted real estate, shall be invalid if it disinherits children, unless acknowledged before and approved by 'a Judge of a County Court of the State of Oklahoma', does not specify that County Judge shall have such authority, and any County Judge of Oklahoma may approve such will, regardless of failure to approve by any other County Judge to whom previously submitted."

But, in the opinion of the Supreme Court of Oklahoma, in *Parnacher et al.* v. *Mount, supra,* it was further declared:

> "In *Armstrong* v. *Letty,* 85 Okl. 205, 209 P. 168, it was said in the first syllabus:
>
> " 'The approval and acknowledgment of the will of a fullblood Indian, required by Act Cong. April 26, 1906, sec. 23, as amended by Act. Cong. May 27, 1908, sec. 8, is not an element of the execution and attestion contemplated by the statute of Oklahoma and is not within the purview of the jurisdiction of the county court in admitting a will to probate.'
>
> "And in the body of that opinion it was said:
>
> " 'This court has repeatedly held that the sole question involved, when a will is offered to the county court for probate, is the factum of the will. That is, has the will been executed and attested in the manner and form required by the statutes, and was the testator competent to make a will at the time he made it, and was he free from the disabilities which operate under our statute to defeat the will?' "

The Supreme Court of Oklahoma, in *Parnacher et al.* v. *Mount,* therefore, obviously quoted with approval from *Armstrong* v. *Letty,* to the effect that the question presented by petitioners herein as to the invalidity of the will as to restricted property for lack of proper approval could not be conclusively determined in the proceeding then pending before it, although it could be adjudicated in an independent action in the proper court to try the title to the restricted property, such as this case. Petitioners say that there is not any other way to construe that opinion. Petitioners were denied any remedy for the matters they

complained of in this suit in that proceeding, although by the settled rule of practice in the State, they had a remedy by suit to quiet title (or in ejectment if they had lost possession of the restricted land) in the District Court of the State, the court of general original jurisdiction. *Armstrong* v. *Letty, surpa.*

This suit was commenced by petitioners as plaintiffs against respondent as defendant in the United States District Court for the Eastern District of Oklahoma on April 17, 1952 (R. 1-15). It is brought to quiet title to the restricted land, and other restricted property, mainly on the ground that the will is void as to restricted property because under the facts of this case the County Judge of Garvin County did not have jurisdiction to approve the will after the question as to whether it should have been approved was submitted to the County Judge of Pontotoc County and he had refused to approve it, and that the purported approval is ineffective. The basis of federal jurisdiction is the existence of a federal question (proper construction of Section 23 of Act of Congress of May 27, 1908, 35 Stat. 312, as amended by Act of May 27, 1908, 35 Stat. 312, Sec. 8) (R. 1), the amount in controversy exceeding $3,000.00, exclusive of interest and costs (R. 1, 21, 23). Respondent filed an answer after motion to dismiss was overruled (R. 21), and the case was tried on February 10, 1953 (R. 27), and at the conclusion of the trial, judgment was rendered for defendant (respondent) (R. 65). The Federal District Court was of the opinion that the opinion and decision of the Supreme Court of Oklahoma in the probate proceeding was not *res adjudicata* or the basis for any plea of estoppel by judgment as to the issues in this

suit (R. 67), but rendered judgment for the defendant (respondent) on the ground that the will had been properly approved by the County Judge of Garvin County, although it had been previously submitted to the County Judge of Pontotoc County for approval and he had refused to approve it, and that the approval of it by the County Judge of Garvin County was valid and effective (R. 29, 30). Petitioners appealed to the Court of Appeals for the Tenth Circuit, and that Court affirmed the judgment for defendant on the ground that the decision of the Supreme Court of Oklahoma in the will contest proceeding was *res adjudicata* or an estoppel by judgment as to the issues presented by plaintiffs in this case (R. 93-100), and did not decide the question as to whether the attempted approval of the will by the County Judge of Garvin County was void and ineffective, because of lack of jurisdiction after the will had been presented to the County Judge of Pontotoc County for acknowledgment and approval and he had refused to approve it.

Petitioners assert that the error in the decision of the Court of Appeals of which certiorari is now sought for review of same is clearly set forth in the petition for rehearing and brief in support thereof which petitioners filed in the Court of Appeals, and which is set forth in full in the record (R. 101-120). The opinion and decision of the Supreme Court of Oklahoma in *Parnacher et al.* v. *Mount, supra,* is not *res judicata* as to the issues in this suit because of the well-established rule that a judgment is not conclusive on matters which were beyond the jurisdiction of the Court or which by reason of the nature of the case or the form of the action could not have been adjudicated in

the proceeding, and the Supreme Court of Oklahoma recognized, in its opinion in *Parnacher et al.* v. *Mount*, that was the case by its quotation with approval to that effect from *Armstrong* v. *Letty*, 85 Okla. 205, 209 Pac. 168. Under this applicable rule (50 C.J.S., Judgments, sec. 731, page 222; 34 C.J. 935; 34 C.J. 823), it makes no difference if the point is purportedly decided, the decision is not *res adjudicata*, as to such point when the power of the Court to determine the question in the proceeding before it is denied, on the ground the remedy is not in that proceeding, but if the right exists, the remedy lies in another kind of action or proceeding in the proper court having jurisdiction. (*United States* v. *Ash Sheep Co.* (9th Cir.), 250 Fed. 592, affirmed in *Ash Sheep Co.* v. *U. S.*, 252 U.S. 159). And this principle does not conflict with the decision of this Court in *Angel* v. *Bullington*, 330 U.S. 183, as long as it is recognized that a remedy in another proceeding or action in another court of the State is open, if the right exists, as was done by the Supreme Court of Oklahoma in its decision in *Parnacher et al.* v. *Mount, supra.* (See brief in support of petition for rehearing in the Court of Appeals) (R. 115-119).

By the decision of the Supreme Court of Oklahoma, in the will contest proceeding petitioners were denied any remedy in that proceeding as to the matters complained of by them in this suit, not on the ground of inaccessibility of all the courts of the State to the litigation of the point involved, but on the ground that the distribution of judicial power among the various courts of the State required the suit to obtain a conclusive determination of the point in question to be brought in another court in the State, thus bringing this case within the exception to the rule applied

in *Angel* v. *Bullington, supra*, as stated in the opinion of this Court in that case, and, now, in this suit, the Court of Appeals for the Tenth Circuit has refused to pass upon the merits of plaintiffs' suit upon the ground that the claim is *res judicata* by reason of the decision of the Supreme Court of Oklahoma in the probate proceeding, and, so, petitioners say they are wrongfully deprived of their remedy to obtain an adjudication of the federal rights asserted by them herein, and may be thus deprived of their property without due process of law, unless this Court grants this petition for a writ of certiorari in this case, in order to review the decision of the Court of Appeals.

REASONS RELIED UPON FOR ISSUANCE OF WRIT

1. The Court of Appeals for the Tenth Circuit has decided an important question of local law in a way probably in conflict with applicable local decisions, because under the settled rule of the State Courts of Oklahoma there can never be any conclusive determination of the validity of a will as an alienation of property in the proceeding for probate of such will, the only issue triable in such proceeding being the *factum* of the will, that is, whether it has been executed in accordance with the requirements of the state statutes for execution of a will and whether the maker of the will was free from disabilities which operate to defeat the will under the statutes of the State.

2. The Court of Appeals for the Tenth Circuit did in its opinion misconstrue the decision of the Supreme Court of Oklahoma in the case of *Parnacher et al.* v. *Mount*, 207

Okla. 275, 248 P.2d 1021, and by reason thereof has denied petitioners any remedy as to the matters complained of by them in this suit and as to the federal rights asserted by them herein as such federal rights were not necessarily involved or adjudicated in the litigation of the State Courts.

3. In the decision and opinion of the Court of Appeals there has been an erroneous application as precedent of the decision of the Supreme Court of the United States in *Angel* v. *Bullington*, 330 U.S. 183, as the situation presented by this case was specifically expected from the operation of the rule of *res judicata* in the opinion of this Court in that case.

4. The decision of the Court of Appeals for the Tenth Circuit is probably in conflict with applicable decisions of this Court on the point as to when rights asserted under federal laws have been conclusively adjudicated in a proceeding in State Courts so as to be *res judicata* in a proper suit in the Federal Courts (*Angel* v. *Bullington*, 330 U.S. 183; *Troxell* v. *Del. L. & W. R. Co.*, 227 U.S. 434; *Ash Sheep Co.* v. *U. S.*, 252 U.S. 159).

5. The opinion of the United States Court of Appeals for the Tenth Circuit may deprive petitioners of property without due process of law unless corrected by this Court, as by such decision petitioners are denied any remedy as to the rights, asserted by them in this suit and the opinion of the Supreme Court of Oklahoma, which the United States Court of Appeals held to be *res judicata* as to the rights asserted by petitioners, recognized that there was no jurisdiction in the trial courts in Oklahoma in that particular proceeding to adjudicate the issues presented

by this suit, and petitioners were thus denied any remedy in that proceeding as to the issues presented by this suit.

6. The United States Court of Appeals has by its decision so far departed from a correct application of the rules as to when a judgment or decision of a court of a matter is *res judicata* or an estoppel by judgment, that the Court of Appeals has departed from the accepted and usual course of judicial proceedings in such a way as to call for the exercise of this Court's power of supervision.

7. The case presents an important question of Federal Law (proper construction of Section 23 of Act of Cong. of April 26, 1906, 34 Stat. 137, 145, as amended by section 8 of Act of May 27, 1908, 35 Stat. 312, 315, as applied to the facts of this case) which should be decided and settled in this case and has erroneously refused to decide the question because of an erroneous assumption that the question is *res adjudicata* and previously conclusively determined by a decision of the Supreme Court of Oklahoma.

8. Certiorari should be granted in this cause because of the importance of questions presented.

SPECIFICATIONS OF ERROR

1. The Court of Appeals erred in holding that the decision of the Supreme Court of Oklahoma in the case of *Parnacher et al.* v. *Mount*, 207 Okla. 275, 248 P.2d 1021, was *res judicata* and conclusive on petitioners in this case as to the question as to whether the County Judge of Garvin County, Oklahoma, had jurisdiction to approve the will of Liesiny McLean Walton, and as to whether the

purported approval of the will by the County Judge of Garvin County, Oklahoma, complied with the requirements of Sec. 23 of the Act of Congress of April 26, 1906, 34 Stat. 137, 145, as amended by Act approved May 27, 1908, 35 Stat. 312, 315, and as to whether the alleged will is void and ineffective as to restricted property.

2. The Court of Appeals erred in not holding that the question as to whether the will of Liesiny McLean Walton had been properly approved in accordance with said Act of Congress so as to be effective as an alienation of restricted property had not been conclusively determined by the decision of the Supreme Court of Oklahoma in the case of *Parnacher et al.* v. *Mount*, 207 Okla. 275, 248 P.2d 1021, on the appeal from the order admitting the will to probate.

3. The Court of Appeals erred in not holding that the County Judge of Garvin County, Oklahoma, did not have jurisdiction to approve said will after such same will had been presented to the County Judge of Pontotoc County, Oklahoma, for his approval at the time of its execution, and he had refused to approve it.

4. The Court of Appeals erred in not holding that the alleged will of Liesiny McLean Walton is void as to restricted property.

5. The Court of Appeals erred in not determining that the plaintiffs are the owners by inheritance of all property of Liesiny McLean Walton which she owned at the time of her death and which was subject to restrictions upon alienation imposed by Acts of Congress, and erred in not reversing the judgment of the United States District Court for the Eastern District of Oklahoma with directions

that judgment be rendered for plaintiffs who are the petitioners here.

6. The Court of Appeals erred in denying petitioners' petition for rehearing.

Wherefore petitioners pray that a writ of certiorari be granted by this Court in order that the decision of the United States Court of Appeals for the Tenth Circuit in case numbered 4637 therein, entitled, Nonles Parnacher, Devet Parnacher, Nannie Parnacher, now Johnson, and Salina Scott, appellants, v. Houston B. Mount, appellee, may be reviewed by this Honorable Court, and that the judgment of said Court of Appeals be reversed and for such other and further relief as this Court may deem proper.

JAMES W. BOUNDS,
Hugo, Oklahoma,
Counsel for Petitioners.

Of Counsel:
TURNER M. KING,
CARLOSS WADLINGTON,
Ada, Oklahoma.

No. .....

Supreme Court of the United States

OCTOBER TERM, 1953

NONLES PARNACHER, DEVET PARNACHER,
NANNIE PARNACHER, now Johnson,
and SALINA SCOTT,
Petitioners,

VERSUS

HOUSTON B. MOUNT,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION OF THE COURT BELOW

The opinion of the Court of Appeals for the Tenth Circuit in this case has not yet been reported, but is included in the transcript of the record filed herewith at pages 92 to 100, inclusive. The District Court did not write an opinion.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1254 of Title 28, United States Code.

STATEMENT OF THE CASE

Reference is made to the statement of the case contained in the petition for writ of certiorari filed herewith.

Some material allegations of the complaint (R. 1-14), which are admitted by the answer (R. 21-27) are that the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00, and that the value of the property involved is in excess of $3,000.00; the plaintiffs (petitioners) are in the possession of the real estate, and the land was allotted and patented to Liesiny McLean, then Walton, deceased, a full-blood Chickasaw Indian, enrolled opposite roll No. 777 of the roll of Chickasaws by blood, and she was the owner of the land involved at her death, and during her lifetime it was restricted, and the plaintiffs are the heirs of the allottee and are the owners of the land and other restricted property of which she died seized if the will is void as to restricted property, and, if the will is void as to such restricted property, the plaintiffs acquired title thereto by inheritance from the allottee; and that the purported will, if effective, disinherits them, and that the three plaintiffs who are children of the allottee are full-blood, enrolled Chickasaw Indians, and the plaintiff who is a granddaughter of the allottee is of 7/8ths degree of Indian blood, and that the will is void as to restricted property unless it was properly acknowledged and approved in compliance with Section 23 of the Act of Congress of April 26, 1906, 34 Stat. 137, 145, as amended by Section 8 of the Act of May 27, 1908, 35 Stat. 312, 315, and the restricted land involved is situated in the Eastern District of Oklahoma, of which the defendant is a resident.

The County Judge of Pontotoc County, before whom the will was executed, and to whom it was then presented for acknowledgment and approval, testified by deposition which was admitted in evidence in this case (R. 40, 70) that the testatrix was an old full-blood Indian woman and that the will was disinheriting her children and grandchild and devising her property to a white man, and that it did not seem to him to be a proper one for approval under the circumstances; that he was told that Mr. Mount had been helping her and was going to help her; that he was not informed how much he had helped her and had no way of knowing what he was going to do for her in the future, and was not shown that there was any adequate consideration for the disinheritance of the children and grandchild, and, therefore, determined that the will should not be approved and refused to approve it (R. 42-45).

The federal law requires that both the acknowledgment and approval be certified by the same officer in writing on the will. That is undisputed. *Davis* v. *Williford*, 271 U.S. 484.

The testimony of Moss Wimbish, the County Judge to whom the will was presented when it was executed and who refused to approve it, shows that there was not any question about the acknowledgment (R. 45), but the certificate, which Mr. McArthur, the attorney who had drawn the will, had prepared and had attached to it at the time of its execution and which he asked the County Judge of Pontotoc County to sign, was a certificate of both acknowledgment and approval (R. 54, 55, 88), and that Judge Wimbish refused to sign it because we would not

approve the will (R. 42, 55); that Mr. McArthur argued to him that he had no discretion in the matter and that it was his duty to approve the will if the testatrix acknowledged it and appeared to know what she was doing and it was what she wanted to do, but that he did not agree with that and believed that the approval was a matter of discretion (R. 43). This testimony is undisputed.

The County Judge of Garvin County testified that when the will was presented to him for approval he was informed by Mr. McArthur that the County Judge of Pontotoc County has refused to approve it (R. 47), and that Mr. McArthur made representations to him as to why the County Judge of Pontotoc County would not approve it (R. 47, 48). He had testified in County Court in the probate proceeding, in effect, that he considered it his duty to approve it, if he was satisfied the will was as the testatrix wanted it and if that was what she wanted to do and that she understood the contents of the instrument, regardless of what disposition the will was making of her property R. 49-50).

SPECIFICATIONS OF ERROR

1. The Court of Appeals erred in holding that the decision of the Supreme Court of Oklahoma in the case of *Parnacher et al.* v. *Mount,* 207 Okla. 275, 248 P.2d 1021, was *res judicata* and conclusive on petitioners in this case as to the question as to whether the County Judge of Garvin County, Oklahoma, had jurisdiction to approve the will of Liesiny McLean Walton, and as to whether the purported approval of the will by the County Judge of Garvin County, Oklahoma, complied with the requirements of Section 23 of Act of

Congress of April 26, 1906, 34 Stat. 137, 145, as amended by Section 8 of Act approved May 27, 1908, 35 Stat. 312, 315, and as to whether the alleged will is void and ineffective as to restricted property.

2. The Court of Appeals erred in not holding that the question as to whether the will of Liesiny McLean Walton had been properly approved in accordance with said Act of Congress, so as to be effective as an alienation of restricted property, had not been conclusively determined by the decision of the Supreme Court of Oklahoma in the case of *Parnacher et al.* v. *Mount*, 207 Okla. 275, 248 P.2d 1021, on the appeal from the order admitting the will to probate.

3. The Court of Appeals erred in not holding that the County Judge of Garvin County, Oklahoma, did not have jurisdiction to approve said will after such same will had been presented to the County Judge of Pontotoc County, Oklahoma, for his approval at the time of its execution, and he had refused to approve it.

4. The Court of Appeals erred in not holding that the alleged will of Liesiny McLean Walton is void as to restricted property.

5. The Court of Appeals erred in not determining that the plaintiffs are the owners by inheritance of all property of Liesiny McLean Walton which she owned at the time of her death and which was subject to restrictions upon alienation imposed by Acts of Congress, and erred in not reversing the judgment of the United States District Court for the Eastern District of Oklahoma with directions that judgment be rendered for plaintiffs who are the petitioners here.

6. The Court of Appeals erred in denying petitioners' petition for rehearing in that court.

ARGUMENT

First Proposition

The County Judge of Garvin County, Oklahoma, had no jurisdiction to approve the will after the question as to whether it should be approved had been presented to the County Judge of Pontotoc County, Oklahoma, and he had refused to approve it.

(Specifications 3, 4, 5)

We are presenting this proposition first so that the Court may be advised as to the question which the Court of Appeals did not decide.

Section 23 of the Act of Congress of April 26, 1906 (34 Stat. 137, 145), as amended by Section 8 of Act of May 27, 1908, (35 Stat. 312, 315), provides:

> "Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: Provided, that no will of a full-blood Indian devising real estate shall be valid if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States Commissioner, or a judge of a county court of the State of Oklahoma."

The act of approving or refusing to approve a will under such statute is not merely a ministerial act, but is a judicial or *quasi-judicial* act. It is not a perfunctory matter or a mere matter of form but the act of approval or refusal to approve such a will involves the exercise of discretion, as is shown by the opinion of this Court in the case

of *Davis* v. *Williford*, 271 U.S. 484, 46 Sup. Ct. 547, 70 L. Ed. 1048, affirming the decision of the Supreme Court of Oklahoma in *Williford* v. *Davis*, 106 Okla. 208, 232 Pac. 828, and as is shown by the opinion of the Supreme Court of Oklahoma in *Anglin* v. *Patterson*, 121 Okla. 106, 248 Pac. 632. The statute requires both an acknowledgment and an approval of the will, which are two separate things. The act of taking the acknowledgment may be ministerial, but the act of approving or refusing to approve the will is not merely a ministerial act but is a judicial or *quasi-judicial* act calling for the exercise of discretion, and the authority to approve carries with it the authority to refuse an approval.

> "The very act of 'approval' imports the act of passing judgment, the use of discretion, and the determination as a deduction therefrom unless limited by the context of the statute."
>
> —*Fuller* v. *Board of University and School Lands of State of North Dakota*, 129 N.W. 1029, 1032, 21 N.D. 212;
>
> 3 Words and Phrases 831.

In *Melton* v. *Cherokee Oil & Gas Co.*, 67 Okla. 247, 253, 170 Pac. 691, 697, the same is held, and that:

> "The act of approval 'imports the act of passing judgment, the use of discretion, and the determination as a deduction therefrom'; to confirm, ratify, sanction, or consent to some act or thing done by another; * * *."

and that:

> "Official action, the result of judgment or discretion, is a 'judicial act'."

In 50 C.J.S., at page 561, under heading, "Judicial", it is said:

> "The distinction between ministerial, judicial, and other official acts, seems to be that, where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment the act is ministerial; but, where the act to be done involves the exercise of discretion or judgment in determining whether the duty exists, it is not to be deemed merely ministerial * * *."

At page 562, it is said:

> "'* * * "Quasi Judicial." The term is used in a sense at least analogous to that of the word "judicial" * * *.' In a general sense it is used to indicate an exercise of judgment or discretion or a choice of alternatives; and is particularly applied to acts, duties, or functions which require the exercise of discretion or judgment by officers or agencies other than those which strictly constitute a part of the judiciary, and specifically those officers or agencies which constitute the administrative or executive branch of the government. * * * the more accurate term 'quasi judicial' is employed to describe governmental officers, boards, or agencies which, while not a part of the judiciary, exercise functions of a judicial nature; and so, where a non-judicial officer has the authority to hear and determine the rights of persons or property, *or the propriety of doing an act, or where a power vests in a judgment or discretion*, so that it is of a judicial character or nature, but does not involve the exercise of the functions of a judge, or where it is conferred on an officer having no authority of a judicial character, the expression used is generally 'quasi judicial'."

In this Court's opinion, in *Davis* v. *Williford, supra,* with reference to said Act of Congress, it was said:

> "It is clear that it was intended by this proviso to prevent a full-blood Indian from being overreached and imposed upon, and induced for an inadequate consideration or by trickery, to deprive his heirs of their inheritance; and that, to this end, a will devising his land to other persons should not be valid unless acknowledged before and approved by a judicial or quasi judicial officer of the United States. To make certain of this, *the officer was not to approve the will unless* the testator appeared before him in person and acknowledged its due execution, and, upon the examination of the testator, *the will appeared to be of such a character and based upon such consideration as to warrant its approval.* Plainly, it was not intended that such acknowledgment and approval should be a perfunctory matter."

In discussing the meaning of the proviso in the section, the Supreme Court of Oklahoma, in *Anglin* v. *Patterson, supra,* said:

> "Thus it appears that before such will is valid there must be two distinct acts upon the part of the officer designated by Congress, before whom such person appears to execute such a will. The first act required is that the will be acknowledged before such officer. It then requires that the will be approved by such officer. It was clearly the intention of Congress that only certain classes of officers be given the authority before whom such a will might be acknowledged and approved. And from this act we further conclude that it was the intention of Congress that such officers should so be informed of the acts and circumstances surrounding the execution of said will that the execution

might then be submitted to them for their approval, or *if the facts justified it, to refuse an approval.*"

The Supreme Court of Oklahoma thereby said in that case that the will should be executed before the officer before whom it was to be acknowledged and to whom it was to be submitted for approval.

Granting that there is no specific provision as to venue in the statute, it may be that the County Judge of Garvin County would have had jurisdiction to approve the alleged will if it had not already been submitted to the County Judge of Pontotoc County for approval or refusal of approval, and he had refused to approve it (R. 42, 55, 83). It may not be strictly a question of whether the County Judge of Pontotoc County, in refusing to approve the will rendered the question as to whether it should be approved *res judicata* (42 Am. Jur., Public Adm. Law, Sec. 161), but it is a question of jurisdiction (73 C.J.S., Public Adm. Bodies, Sec. 53). Administrative determinations made without jurisdiction are void, even if the question arises in a collateral proceeding (42 Am. Jur., Public Adm. Law, Sections 109, 157, 159; 73 C.J.S., Public Adm. Bodies, Sections 66, 146).

Did the County Judge of Garvin County have jurisdiction?

The answer is found in Section 53 of Title, Public Administrative Bodies and Procedure, in Volume 73, C.J.S., where it is said:

"The powers and duties of particular administrative officers and agencies as against other officers and agencies are determined by the organic and statutory

provisions which grant them their powers and define their duties; and *where they have concurrent powers or coordinate jurisdiction, the one which first acquires jurisdiction over a particular matter has exclusive jurisdiction thereof.*"

Under this rule, the County Judge of Garvin County had no jurisdiction or authority to approve the purported will in this case, and his action in attempting to do so, was void, and such will had already been, in effect, adjudged invalid and rendered inoperative as to restricted lands and property of Liesiny Walton by the action of the County Judge of Pontotoc County in refusing to approve it when it was submitted to him for his action of approval. If a new will had been executed, it might have been a different situation.

Under the authorities cited in 73 C.J.S., Title, Public Administrative Bodies and Procedure, Sec. 53, page 376, note 79, the will is void as to restricted property. If this was not the rule, an intolerable situation would be created, and the purposes and objects of the Federal statute, which are stated in *Davis* v. *Williford, supra,* would be circumvented, and the statute rendered inoperative and of practically no protection to the parties for whose benefit and protection it was enacted.

Under said note 79 at page 376 of Volume 73, C.J.S., *supra,* the following authorities are cited in support of the text above quoted: *Alabama Elec. Co-op.* v. *Alabama Power Co.,* 251 Ala. 190, 36 So.2d 523; *Trumbull County Board of Education* v. *State,* 122 Ohio St. 247, 171 N.E. 241; *London Independent School Dist.* v. *Thomerson,* Tex. Civ. App.,

223 S.W.2d 314; *Terminix Co.* v. *Contractors' State License Board of Dept. of Professional and Vocational Standards*, 84 Cal.App.2d 167, 190 P.2d 24; *State ex rel. Corder School Dist. No. R-3* v. *Oetting*, Mo. App., 245 S.W.2d 157, 160. There is no authority to the contrary which we have been able to find, except what was said by the Supreme Court of Oklahoma in *Parnacher* v. *Mount, supra*, 207 Okla. 275, 248 P.2d 1021, which petitioners contend is not binding on this Court in this case.

> "All questions of the jurisdiction, power, or authority of an administrative agency to make an order or decision which it undertook to make are open to judicial inquiry and determination. The court is not bound or concluded by the agency's finding of jurisdictional facts, but may examine and weigh all the evidence concerning such facts and make therefrom its own independent findings." (73 C.J.S., Public Adm. Bodies, sec. 227, page 597).

The question is one of construction of a federal statute and the statute should be construed in the light of what was said regarding its purpose in the opinion of this Court in *Davis* v. *Williford, supra*, and the statute should not be construed so as to defeat its purpose. To hold this will valid as to restricted property would completely defeat the purpose of the Federal law and render it of no protection whatever to the parties for whose benefit it was enacted. For applicable rules of statutory construction, see: *Harper* v. *Victor* (8th Cir.), 212 Fed. 903, 129 C.C.A. 423; *Darby-Lynde Co.* v. *Alexander* (10th Cir.), 51 F.2d 56; *Federal Land Bank* v. *Howell* (10th Cir.), 123 F.2d 50; *Lewis* v. *Moore*, 199 F.2d 745, 749; 59 C.J. 961 *et seq.* If this

will was held valid, as to restricted property, the policy of the Federal Government in providing for the protective device of approval of an administrative authority for such a will would be frustrated, and the statute rendered ineffectual and any officer to whom such a will was submitted for approval could not follow the directions of the Supreme Court of the United States in *Davis* v. *Williford, supra,* with any effect, and parties who were wrongfully attempting to obtain a will of a full-blood Indian to restricted land, which was without adequate consideration disinheriting the lawful heirs would be left free to go to all of the 77 County Judges in the State of Oklahoma, and, although the approval of the will was refused by 76 of them, induce the 77th one to approve it, and determine that all of those who had refused to approve it had erred, or to go to every United States Commissioner in the United States seeking an approval of the same will after being refused an approval of it by every County Judge in the State of Oklahoma. Congress never intended any such absurdity by this statute. Petitioners ask for a construction of the statute which will give it effect and life, rather than one which would defeat its purpose, and destroy it. This Court may decided this question although the Court of Appeals did not. *Liberty Oil Co.* v. *Condon, National Bank,* 260 U.S. 235.

Second Proposition

The Court of Appeals erred in holding that the decision of the Supreme Court of Oklahoma in the case of *Parnacher et al.* v. *Mount*, 207 Okla. 275, 248 P.2d 1021, was res judicata and conclusive on petitioners as to the issue in this case as to whether the County Judge of Garvin County, Oklahoma, had jurisdiction to approve the will and as to whether the will is void and ineffective as to restricted property.

(Specifications 1, 2, 6)

The admission to probate of the will, and direction that the defendant herein be appointed executor without bond in the State Court (R. 86) did not prevent this suit, and the Federal Court had jurisdiction of this case. *Armstrong* v. *Letty*, 84 Okla. 205, 209 Pac. 168; *Lauderdale* v. *Tookolo*, 114 Okla. 187, 245 Pac. 587; *Letts* v. *Letts*, 73 Okla. 313, 176 Pac. 234; *Ferguson* v. *Patterson* (10 Cir.), 191 F.2d 584; *Coats* v. *Riley*, 154 Okla. 291, 7 P.2d 644; *Phillips* v. *Smith*, 186 Okla. 636, 100 P.2d 249; *Anglin* v. *Patterson*, 121 Okla. 106, 248 Pac. 632; *Courtney* v. *Daniel*, 124 Okla. 46, 253 Pac. 990; *Kolb* v. *Ball*, 101 Okla. 100, 223 Pac. 660. The restricted property is not subject to administration in the absence of a valid will thereof. *Kolb* v. *Ball, supra; Armstrong* v. *Letty, supra; Wolfe* v. *Gills*, 96 Okla. 6, 219 Pac. 250; *Cowokochee* v. *Chapman*, 90 Okla. 121, 215 Pac. 759; *Bilby* v. *Noble*, 106 Okla. 302, 234 Pac. 198; *March* v. *Peter*, 179 Okla. 207, 64 P.2d 912; *Hardridge* v. *Hardridge*, 168 Okla. 7, 31 P.2d 597; *Moore* v. *Jefferson*, 190 Okla. 67, 120 P.2d 983; *In re Micco's Estate*, 59 F. Supp. 434. Equity may remove the cloud on plaintiffs' property caused by the purported will. 74 C.J.S., Quieting Title, Sec. 14, page 36, note 95; 51 C.J. 159, note 7. Any determination in the pro-

bate proceeding that Mount should be appointed executor without bond of the estate does not determine right to possession or title to the property involved in this suit, 33 C.J. 1085, note 53; *Kobb* v. *Ball, supra; Armstrong* v. *Letty, supra; In re Way's Estate,* 29 Cal.App.2d 669, 85 P.2d 563; *Bertig* v. *Higgins,* 89 Ark. 70, 115 S.W. 935; *Pfister* v. *Johnson,* 13 F. Supp. 662. This suit is not one of the types of proceedings mentioned in Section 3(a) of the Act of Congress of August 4, 1947 (61 Stat. 732). A federal question is presented. Cl. 1, Sec. 2, Art. 3, Constitution of the United States; 28 U.S.C., Sec. 1331; 74 C.J.S., Quieting Title, Sec. 62, page 89; *Mashunkashey* v. *Clinton,* 11 F. Supp. 456, 457; *Tennessee* v. *Davis,* 100 U.S. 257, 25 L. Ed. 648; *Starin* v. *New York,* 115 U.S. 248, 29 L. Ed. 388, 6 Sup. Ct. 28; *Jackson* v. *Gates Oil Co.,* 297 Fed. 549; *Mudd* v. *Perry,* 25 F.2d 85; *Jefferson* v. *Gypsy Oil Co.,* 27 F.2d 304; *Board Com'rs Creek County* v. *Seber,* 130 F.2d 663, 667, affirmed, *Board Com'rs Creek County* v. *Seber,* 318 U.S. 705; *Roubedeax* v. *Quaker Oil & Gas Co.,* 23 F.2d 277, 280, 281.

Since this suit could have been brought in the District Court of Pontotoc County, Oklahoma, the proper State Court of general original jurisdiction, it could be maintained, in the Federal Court because of the existence of the Federal question. *Ferguson* v. *Patterson,* 191 F.2d 594, *supra.*

If under the law of Oklahoma any purported determination in the proceeding to probate the will of the question, as to whether the will had been properly acknowledged and approved so as to be effective as to restricted property, would not be *res judicata* or an estoppel by judg-

ment in a suit to quiet title to the restricted property brought in the proper State Court, it could not have such effect in this action. *Oklahoma Packing Co.* v. *Oklahoma Gas and Electric Co.*, 309 U.S. 4; *Coppedge* v. *Clinton*, 72 F.2d 531. Under the law of Oklahoma any such determination in the proceeding for probate of a will or appointment of an executor as directed in the will could not have that effect, as under the law of Oklahoma, the County Court, the court of original probate jurisdicition, does not have jurisdiction in such proceeding to try and determine the question. *Armstrong* v. *Letty, supra;* Sections 11, 12, Article 7, Constitution of Oklahoma. In the probate proceeding the State District Court and the Supreme Court of the State had only appellate jurisdiction and did not have jurisdiction to determine any question which could not have tried in the original trial court, the County Court. Sections 2, 10, 16, Article 7, Constitution of Oklahoma; *In re Barrett's Estate*, 181 Okla. 262, 72 P.2d 482; *In re Hick's Estate*, 189 Okla. 310, 116 P.2d 905; *Taliaferro* v. *Reirdon*, 186 Okla. 605, 99 P.2d 494; *Perry* v. *Smith*, 132 Okla. 181, 269 Pac. 1074; *Parker* v. *Lewis*, 45 Okla. 807, 147 Pac. 310; *Wise* v. *Cutchall*, 171 Okla. 60, 41 P.2d 864; *In re Wagner's Estate*, 178 Okla. 384, 62 P.2d 1186. Since the Supreme Court of Oklahoma in its opinion in *Parnacher et al.* v. *Mount, supra*, approved the holding of the State District Court that the District Court or the County Court had no jurisdiction in that proceeding to determine the question, it had no jurisdiction to conclusively determine the question. *Clark* v. *Gray*, 204 Okla. 221, 228 P.2d 654; *Jones* v. *Norris*, 185 Okla. 125, 90 P.2d 403; 4 C.J.S., Title Appeal and Error, Sec. 42 Since the Supreme Court of Oklahoma had no jurisdiction

to conclusively determine any question which could not have been adjudicated in the trial courts in that proceeding, any expression of opinion or purported determination of the point by the Supreme Court of Oklahoma was made without jurisdiction and was void. *Spencer* v. *Colbert*, 135 Okla. 111, 274 Pac. 646. Since the Supreme Court of Oklahoma in *Parnacher et al.* v. *Mount, supra*, reaffirmed the rule of *Armstrong* v. *Letty, supra*, that there was no remedy in the trial courts in that proceeding to obtain a determination of the question as to whether the will had been effectively approved in accordance with the Act of Congress, petitioners herein were denied any remedy in that proceeding as to such question and it would be contrary to due process of law for the purported determination of the point by the Supreme Court of Oklahoma in its opinion to be treated as conclusive in this suit. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673.

Clearly under the law of Oklahoma the Appellate Courts in the probate proceeding had no more jurisdiction to conclusively determine the question than the original trial court (County Court) and any judgment or decision of a point by a court lacks due process of law where the court exceeds its jurisdiction in deciding the point and jurisdiction of the subject matter cannot be conferred by consent, and any such decision is not entitled to protection under the full faith and credit requirements of the Federal Constitution and statutes. 50 C.J.S., Judgment, Section 900, page 530; 16 C.J.S., Constitutional Law, Section 625, page 1272; *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill*, 281 U.S. 673; *Pennoyer* v. *Neff*, 95 U.S. 714; *Scott* v. *McNeal*, 154 U.S. 34; 49 C.J.S., Judgments, Sec. 19, page

49; *Spencer* v. *Colbert, supra; In re Philadelphia Rapid Transit Co.* (3rd Cir.), 117 F.2d 730.

Under the law of Oklahoma there can be no *final* judgment in a probate proceeding which is conclusive as a determination of the validity of a will as an alienation of property until the final decree of distribution is rendered in the probate proceeding, and that has never been done in the particular probate proceeding which was before the Supreme Court of Oklahoma in an appeal from an interlocutory order in *Parnacher* v. *Mount, supra. Armstrong* v. *Letty, supra;* (58 Okla. Stats. Ann., Sections 23, 41, 631 632; Constitution of Oklahoma, Sections 12 and 13 of Article 7). No such interlocutory order as was affirmed by the Supreme Court of Oklahoma in *Parnacher* v. *Mount,* can operate as *res adjudicata* or as an estoppel by judgment, as it was not a final judgment and the doctrine of *res judicata* or estoppel by judgment applies only to final judgments and not to interlocutory matters. 50 C.J.S., Judgments, Section 620, page 43; *Crayne* v. *Crayne,* 54 Nev. 205, 13 P.2d 222, 84 A.L.R. 716; *Western Paving Co.* v. *Board of Commissioners of Lincoln County,* 183 Okla. 281, 81 P.2d 652; *United States et al.* v. *United States Smelting, Refining and Mining Co.,* 339 U.S. 186.

This suit was not on the same cause of action as was involved in the proceeding to probate the will as that had to do only with the question as to whether the will should be admitted to probate and the defendant appointed executor without bond as directed therein, and there could be some unrestricted property upon which the will could operate if it was void as to restricted property under the

federal statute. *Armstrong* v. *Letty, supra; Phillips* v. *Smith, supra.*

When the second suit is upon a different cause of action, a former adjudication is conclusive only on the issues which were litigated in the first suit and which could properly have been adjudicated therein under the doctrine of estoppel by judgment and the doctrine of *res adjudicata* is not applicable, *Troxell* v. *Del. L. & W. R. Co.*, 227 U.S. 434; *U. S.* v. *International Bldg. Co.*, 97 L. Ed. Advance Sheet of May 25, 1953, page 738; *Uphoff* v. *Meier*, 184 Okla. 378, 87 P.2d 960; *In re Assessment of First National Bank of Chickasha*, 93 Okla. 233, 220 Pac. 909, 57 A.L.R. 890.

In the case of *In re Assessment of First National Bank of Chickasha*, 93 Okla. 233, 220 Pac. 909, 57 A.L.R. 890, *supra*, the Supreme Court of Oklahoma decided certain points included in the syllabus by the Court in the case of *In re Assessment of First National Bank of Chickasha*, 58 Okla. 508, 160 Pac. 469, were not conclusive in the second proceeding and held:

> "The conclusiveness of a judgment extends only to the question directly in issue, and not to any incidental or collateral matter, though it may have arisen and been passed upon.
>
> "A judgment is conclusive *by way of estoppel* only as to those facts which were necessarily within the issues, and without proof of which the judgment could not have been rendered."

So the fact that the point in question was expressed in the official syllabus of the Supreme Court of Oklahoma in the will contest proceeding makes no difference.

The decision of the Supreme Court of Oklahoma is not the law of this case. *Fidelity and Deposit Co. of Maryland* v. *Port. of Seattle*, 9th Cir., 106 F.2d 777, 781. It is not binding authority. 35 C.J.S., Fed. Courts, Section 187, page 1277.

In Oklahoma there is a statute (12 Okla. Stats. Ann. Section 977) which directs that a syllabus of the points of law decided by the Supreme Court in a case be prepared by the Court, but regardless of such statute, the matter included in the first paragraph of the syllabus by the Court in *Parnacher* v. *Mount, supra,* could have no more force than *dictum* because that was not a triable issue in that proceeding and under such a statute the official syllabus must be read in the light of the facts and issues of the case. *Williamson Heater Co.* v. *Radich*, 120 Ohio St. 124, 190 N.E. 403; *Perkins* v. *Benguet Consol. Mining Co.*, 342 U.S. 437, 442.

In the late case of *Midwestern Insurance Co.* v. *Cathey*, 262 P.2d 434, the Supreme Court of Oklahoma ruled that part of the matter in the official syllabus in the case of *Great American Indemnity Co.* v. *Deatherage*, 175 Okla. 28, 52 P.2d 827, was *dictum* and refused to follow it on that ground.

If the Supreme Court of Oklahoma in its decision in *Parnacher* v. *Mount, supra,* had intended to make the purported determination of the point in the first paragraph of the syllabus of the Court conclusive as to the issues in this case, it would have been necessary that the following cases be overruled: *Armstrong* v. *Letty*, 85 Okla. 205, 209 Pac. 168; *Lauderdale* v. *Tookolo*, 114 Okla. 187, 245 Pac. 587;

Letts v. *Letts,* 73 Okla. 313, 176 Pac. 234; *Phillips* v. *Smith,* 186 Okla. 636, 100 P.2d 249; *Anglin* v. *Patterson,* 121 Okla. 106, 248 Pac. 632; *Battiest* v. *Wolf,* 97 Okla. 212, 223 Pac. 661; *Coats* v. *Riley,* 154 Okla. 291, 7 P.2d 644; *Williford* v. *Davis,* 106 Okla. 208, 232 Pac. 828, (which was affirmed by the Supreme Court of the United States in *Davis* v. *Williford,* 271 U.S. 484, 46 Sup. Ct. 547, 70 L. Ed. 1048); *Kolb* v. *Ball,* 107 Okla. 100, 223 Pac. 660; *In re Allen's Will,* 44 Okla. 392, 144 Pac. 1053; *Courtney* v. *Daniel,* 124 Okla. 46, 253 Pac. 990; *Brock* v. *Keifer,* 59 Okla. 5, 157 Pac. 88; *Hill* v. *Buckholts,* 75 Okla. 196, 183 Pac. 42; *Mantz* v. *Gill,* 147 Okla. 199, 296 Pac. 411; *Ward* v. *Cook,* 152 Okla. 234, 3 P.2d 728; *Crawford* v. *LeFevre,* 177 Okla. 508, 61 P.2d 196; and, also several others. But instead of doing that the Supreme Court of Oklahoma in *Parnacher* v. *Mount, supra,* quoted with approval from *Armstrong* v. *Letty* to the effect that the matter was not within the purview of the jurisdiction of the trial court in that proceeding.

In *Lauderdale* v. *Tookolo, supra,* a disinherited heir had contested the probate of the will on specific ground that it had not been properly acknowledged and approved as required by the Federal Statute and the point had been decided against the heir in the probate proceeding and later in the suit brought by the heir to quiet title, it was held that there had been no conclusive determination of the question in the probate proceeding. In the case of *Phillips* v. *Smith, supra,* the State District Court denied probate of a will of a full-blood Indian on the ground that it was void under the federal statute and the Supreme Court of Oklahoma reversed the judgment and directed that the will be admitted to probate and held that the will

could not be denied probate on that ground either in whole or in part and that has been the settled rule in the State Courts of Oklahoma since the decision in *Armstrong* v. *Letty, supra,* in 1922, and the Supreme Court of Oklahoma again ruled in *Parnacher* v. *Mount, supra,* by quoting to that effect from *Armstrong* v. *Letty,* that the question involved could not have been tried or adjudicated in that proceeding for lack of jurisdiction.

How then is it possible for the expression of opinion or purported determination of the point by the Supreme Court of Oklahoma, which only had appellate jurisdiction in that matter, under the law of Oklahoma, to be *res judicata?*

The applicable rule is stated in 50 C.J.S., Title Judgments, Sec. 731, page 222, as follows:

> "A judgment is not conclusive on matters which were beyond the jurisdiction of the court and which by reason of nature of the case could not have been adjudicated."

The decision in *United States* v. *Ash Sheep Co.,* 250 F.2d 592, which was affirmed by this Court in *Ash Sheep Co.* v. *U. S.,* 252 U.S. 159, held that this is the rule although in the first action the Court expresses an opinion as to the merits of the question or issue which could not have been conclusively adjudicated therein.

The same holding is made in *Wyman* v. *Bowman* (8th Cir.), 127 Fed. 257, 62 C.C.A. 189, with reference to a previous decision of the Supreme Court of Iowa. See also, *Oliver* v. *Cunningham,* 7 Fed. 689. In this case the Court of Appeals has misconstrued the decision of the Supreme Court of

Oklahoma in *Parnacher* v. *Mount*, and has erroneously applied as authority for its decision that the matter involved is *res adjudicata* by reason of the decision of the Supreme Court of Oklahoma the decision of this Court in *Angel* v. *Bullington*.

Another reason why the decision of the Supreme Court of Oklahoma in *Parnacher* v. *Mount*, *supra*, is not conclusive of the issues in this case results from the fact that the plaintiffs in this case are all restricted Indian heirs under the Act of Congress of August 4, 1947, 61 Stat. 732, and their title to the restricted property involved is subject to the restrictions upon alienation imposed by Section 1 of the Act of August 4, 1947, for they cannot be divested of such title by any judgment of a State Court in a proceeding to which the United States is not a party, or which Congress has not consented shall be conclusive without the United States being made a party thereto. *Armstrong* v. *Letty supra*. Section 3(a) of such Act of Congress says that: "The State Courts of Oklahoma shall have exclusive jurisdiction * * * of all proceedings to administer estates or to probate the wills of deceased Indians of the Five Civilized Tribes", but this suit is not a proceeding to administer an estate or to probate a will and Section 3(b) of such Act of Congress provides that the United States shall not be deemed to be a necessary or an indispensable party to any proceeding of which the State Courts are given exclusive jurisdiction by Section 3(a), and that:

> "The *final* judgment rendered in any such action or proceeding shall bind the United States and the parties thereto to the same extent as though no Indian property or question were involved."

Provided that a certain notice is served upon the Superintendent for the Five Civilized Tribes.

That language differs from the language used in Section 3 of the Act of Congress of April 12, 1926, 44 Stat. 239, which stated what would be the effect of a suit in which the notice therein provided for was served as therein directed as follows:

> "The proceedings and judgment in said cause shall bind the United States and the parties thereto, to the same extent as though no Indian land or question were involved."

In such a suit as is therein referred to if the notice provided for is not served the proceedings and judgments in the case do not have that effect and are not binding on either the Government or the Indian. *United States* v. *Hellard*, 322 U.S. 363; *Burgess* v. *Bosen*, 31 F. Supp. 352; U. S. v. *Fuston*, 143 F.2d 76; *Neal* v. *Travelers Insurance Co.*, 188 Okla. 131, 106 P.2d 811. It therefore appears that Congress did not go as far in its provision as to the effect of proceedings in a probate proceeding in the 1947 Act, if the notice provided for therein be served as had been provided for the effect of giving of the notice provided for in the 1926 Act, and that it was clearly the intention of Congress by the language in the 1947 Act to the effect that only the final judgment in such a proceeding as was therein referred to should be binding to the same extent as though no Indian property or question were involved to recognize and adopt as the law the rule of *Armstrong* v. *Letty*, *supra*, that by only the final judgment in a probate proceeding (the decree of distribution) can it possibly be conclusively de-

termined that a will is valid and effective as an alienation of restricted Indian land.

It is therefore submitted that the questions involved herein are sufficient to justify this Court in granting certiorari in this case.

Respectfully submitted,

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Hugo, Oklahoma,

Counsel for Petitioners.

Of Counsel:
TURNER M. KING,
CARLOSS WADLINGTON,
Ada, Oklahoma.

January, 1954.

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No. 525

Supreme Court of the United States

OCTOBER TERM, 1953

NONLES PARNACHER, DEVET PARNACHER, NANNIE PARNACHER *now* JOHNSON, and SALINA SCOTT,
Petitioners,

VERSUS

HOUSTON B. MOUNT,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The District Court did not write an opinion; its findings of fact and conclusions of law and judgment appear in the transcript of the record, at pages 27 to 31. The opinion of the United States Court of Appeals of the Tenth Circuit appears in the transcript of the record at pages 93 to 100, and is now reported in 207 F.2d 788 in the advance sheets.

STATEMENT OF THE CASE

The statement of the case contained in petitioners' supporting brief, pages 25 to 27, while substantially correct, so far as it goes, is not concise or complete, and refers

generally to matters set out in the petition for the Writ of Certiorari. It therefore appears advisable to here set out a more complete and concise statement of the case.

The land described in the complaint filed by petitioners in the United States District Court for the Eastern District of Oklahoma (R. 1-14) was, by the Choctaw and Chickasaw Nations patented to Liesiny McLean, the same person as Liesiny Walton, as a part of her homestead allotment as a full-blood member of the Chickasaw Tribe of Indians (R. 9) and said land was restricted and tax exempt in her hands. On August 28, 1945, the said Liesiny Walton executed a will (R. 12) by the terms of which she bequeathed to her three children and to her granddaughter the sum of $5.00 each, and she devised and bequeathed the rest and residue of her property to Houston B. Mount, the respondent herein. On the same day, the said Liesiny Walton, together with two witnesses, Thomas Puller and Richard F. Colbert, and C. L. McArthur, her attorney, took said will to Moss Wimbish, the County Judge of Pontotoc County, at Ada, Oklahoma, and he was asked to approve the will. She appeared not to be able to talk English (R. 42) and she was questioned and made answers through the two interpreters who were also subscribing witnesses to the will (R. 45-46). Judge Wimbish, the County Judge of Pontotoc County, Oklahoma, "declined to approve" the will (R. 42) and the parties left his office.

Thereafter, on September 18, 1945 (R. 47), at the instance and request of Liesiny Walton (R. 55) the said C. L. McArthur took her and the two subscribing witnesses and interpreters to Pauls Valley, Oklahoma, before Honor-

able Sam Goodwin, the County Judge of Garvin County, Oklahoma. He was advised that the County Judge of Pontotoc County had refused to approve the will (R. 48) and for that reason he conducted the examination in more detail than he ordinarily would have done. After full examination of testatrix, he approved the will (R. 47-51) and executed the certificate (R. 13-14) attached to the will, showing the acknowledgment of said will by Liesiny Walton before him and his approval thereof.

On or about February 12, 1949, the said Liesiny Walton died, a resident of Pontotoc County, owning said lands allotted to her as a part of her homestead allotment (R. 28). Thereafter, Houston B. Mount, the person named in said will as executor and principal devisee, offered said will for probate in the County Court of Pontotoc County, Oklahoma. Upon contest by the three children and the granddaughter of Liesiny Walton, the County Court refused to admit the will to probate. On appeal from the order and judgment of the County Court to the District Court, the said will was ordered admitted to probate by said District Court. From said decision, the petitioners herein appealed to the Supreme Court of the State of Oklahoma, and said judgment of the District Court of Pontotoc County, Oklahoma, was affirmed.

In all said proceeding in the State Courts, the petitioners insisted that said State Courts should hold the will void because not properly approved in accordance with the provisions of Section 23 of the Act of Congress of April 26, 1906 (34 Stat. 137), as amended by Section 8 of the Act of May 27, 1908 (35 Stat. 312), particularly because

the will was approved by the County Judge of Garvin County after the County Judge of Pontotoc County had refused to approve it. This position, taken by petitioners, is shown in this record by their exception to Finding of Fact VII (R. 83-84) and by Conclusion of Law VI by the District Court of Pontotoc County, Oklahoma (R. 85-86) and by their statement at page 14 in their Petition for Writ of Certiorari filed herein, wherein they state: *"In the appeal in the Supreme Court of Oklahoma, Petitioners did assert that the will was void as to restricted property, and that it should then be declared to be void as to restricted property, because not properly approved in accordance with the Act of Congress."* Presumably, by reason of this insistance by petitioners, the Supreme Court of Oklahoma did pass on this question and the first paragraph of the syllabus by the Court is as follows:

> "1. Sec. 23, Act of Congress of April 26, 1906, as amended by Act of May 27, 1908, 35 Stat. 312, providing that the will of a fullblood Indian, bequeathing restricted real estate, shall be invalid if it disinherits children, unless acknowledged before and approved by 'a Judge of a County Court of the State of Oklahoma,' does not specify what County Judge shall have such authority, and any County Judge of Oklahoma may approve such will, regardless of failure to approve by any other County Judge to whom previously submitted."
>
> —*Parnacher* v. *Mount*, 207 Okla. 275, 248 P.2d 1021-1022, decided March 25, 1952.

Thereafter, on April 17, 1952 (R. 9), the petitioners herein as plaintiffs, filed this suit in the United States District Court for the Eastern District of Oklahoma (R.

1-14). After trial of the issues, the trial court made findings of fact and conclusions of law (R. 27-30) and rendered judgment in favor of the defendant, respondent herein (R. 30-31).

From that judgment, the plaintiffs (petitioners) appealed to the United States Court of Appeals, Tenth Circuit, and said Court of Appeals, on October 30, 1953, affirmed the judgment of the District Court (R. 93-100), and said petitioners have now filed their Petition for Writ of Certiorari to review said opinion and judgment.

ARGUMENT

Summary of Argument

Point A. No reason for granting Writ of Certiorari is shown.

(1) The decision of the Court of Appeals is not in conflict with applicable state court decisions.

(2) The decision of the Court of Appeals is not in conflict with applicable decisions of this Court.

(3) The decision of the Supreme Court of Oklahoma has not deprived petitioners of any property or right without due process of law; they therein had a full hearing, their day in court, and a chance to win their case.

Point B. Whether or not the State Court's decision is binding on the United States is not an issue here. The United States is not complaining.

Point A

The petitioners have not, either in their Petition for Writ of Certiorari or in their brief in support thereof set up any sound reason for granting the Writ. Certainly they have not met the test set up in Section 5 of Rule 38 of this Court. We think that the statements in the Petition for the Writ, at pages 2 and 3 of said petition, under the subheading *"Jurisdiction"* amounts to an admission that they are unable to point out any "special and important reason" why the Writ should be granted.

Point A-1

Their "claim that in its decision, the Court of Appeals has decided an important question of Oklahoma law in a way probably in conflict with applicable State Court decisions," is not borne out by their petition, their brief, nor the record. The Court of Appeals decided no question of Oklahoma law; it simply accepted the decision of the Oklahoma Supreme Court in the case of *Parnacher* v. *Mount*, 207 Okla. 275, 248 P.2d 1021, as a final adjudication of the issue raised by the parties. No appeal was taken to the Supreme Court of the United States to review that decision, and as pointed out by the Court of Appeals in its opinion in this case, no court other than the Supreme Court of the United States, on appeal or Certiorari, has jurisdiction to review, vacate, or overrule such judgment. This statement of law is abundantly supported by the decisions of this Court. In the case of *Angel* v. *Bullington*, 330 U.S. 183, 67 Sup. Ct. 657, 91 L. Ed. 832, where a similar situation was involved, this Court said:

"Since it was open for Bullington to come here to seek reversal of the decision of the North Carolina Supreme Court shutting him out of the North Carolina courts and he chose not to do so, the decision of the North Carolina Supreme Court concluded an adjudication of a federal question even though it was not couched in those terms. For purposes of litigating the issues in controversy in the North Carolina action, the North Carolina Supreme Court was an intermediate tribunal. If a litigant chooses not to continue to assert his rights after an intermediate tribunal has decided against him, he has concluded his litigation as effectively as though he had proceeded through the highest tribunal available to him. An adjudication of an issue implies that a man had a chance to win his case. The chance was necessarily afforded by the North Carolina litigation. It was in process of determination when the Supreme Court of North Carolina decided it against him. He forewent his right to have a higher court, this Court, enabled him to win his chance by holding that he was right and that the North Carolina Supreme Court was wrong. He cannot begin all over again in an action involving the same issues before another forum in the same State."

Point A-2

The reasons relied upon for issuance of Writ set out at pages 19 to 21 of Petition for the Writ filed herein, likewise fail to show any special and important reason for granting the Writ. At page 2 of their Petition, and also at page 20 under their reason No. 4, petitioners state that the decision of the Court of Appeals "is probably in conflict with applicable decisions of this Court" as to the application of the doctrine of *res judicata* and they cite three

cases apparently claimed by them to be in conflict with the decision of the Court of Appeals in this case.

We submit that the case of *Angel* v. *Bullington*, 330 U.S. 183, 67 Sup. Ct. 657, 91 L. Ed. 832, is not in conflict with the decision of the Court of Appeals in this case, but on the contrary, fully supports it as shown by the quotation from that case set out herein above.

The case of *Troxell* v. *Del., L. & W. R. Co.*, 227 U.S. 434, 57 L. Ed. 586, is clearly distinguishable and not in conflict with the decision of the Court of Appeals in this case. The first case there referred to was tried under the state law of Pennsylvania under which recovery could not be had by reason of negligence of a fellow servant. The second case was brought under the Federal Employers' Liability Act under which negligence of a fellow servant would justify recovery. *In the second case, it was held that all elements of damage had been adjudicated in the first case except the negligence of the fellow servant,* which could not have been adjudicated in the first case. See *Baltimore, S. S. Co.* v. *Phillips*, 274 U.S. 316, 71 L. Ed. 1069, 47 Sup. Ct. 600.

The case of *Ash Sheep Co.* v. *United States*, 252 U.S. 159, 64 L. Ed. 507, involved two cases in the United States District Court of Montana. The first was an equitable action to enjoin trespassing on certain lands. The second case was an action at law to recover a statutory penalty for such trespass. Both cases were brought to this Court by appeal and were argued together and decided together, and this Court held that the statutory penalty could not have been recovered in the equity case and consequently

the decree in the equity case could not be *res judicata* as to the said statutory penalty.

There is no similarity between that case and the case at bar. There are at least two definitely distinguishing features. First, the *Ash Sheep Company* cases were both appealed to this Court. The case of *Parnacher* v. *Mount*, decided in the Supreme Court of Oklahoma, was not appealed to this Court, but the decision of the Oklahoma Supreme Court was allowed to become final.

Second, in the *Ash Sheep Company* equity case, the lower courts held that the statutory penalty could not be recovered in the equity case. This Court concurred in that view and it necessarily follows that the equity case could not constitute *res judicata* as to the law case to recover the statutory penalty. If the Supreme Court of Oklahoma, in the *Parnacher* case, had held that it was without jurisdiction to determine the validity of the approval of the will, there would then have been a situation similar to the situation in the *Ash Sheep Company* case, but the Supreme Court of Oklahoma held that it could, and it did in unmistakable language, hold that the approval of the will by the County Judge of Garvin County, Oklahoma, was valid, and that judgment became final when not appealed to this Court.

It is wholly unavailing for petitioners to contend that the Supreme Court of Oklahoma was without jurisdiction to render the decision that it did render. All of the same parties were before the Court and petitioners were urging the Court to hold the approval of the will by the County Judge of Garvin County to be void. It would be quite an

anomaly to hold that the Court had jurisdiction to hold the approval void but did not have jurisdiction to hold it valid.

The substance of petitioners' argument is that the decision of the Supreme Court of Oklahoma, in the case of *Parnacher v. Mount, supra,* cannot be *res judicata* because the Supreme Court of Oklahoma was without jurisdiction to determine that the approval of the will of Liesiny Walton by the County Judge of Garvin County, Oklahoma, was a valid approval under the provisions of Section 23, of the Act of Congress of April 26, 1906 (34 Stat. 137), as amended by Section 8 of the Act of May 27, 1908 (35 Stat. 312). There is no statute, either state or federal, which deprives the County Court of Oklahoma of authority to determine that question under its general probate jurisdiction granted to it by Sections 12 and 13 of Article 7 of the Constitution of the State of Oklahoma, and implemented by the various acts of the State Legislature, 1951 Oklahoma Statutes, Title 58, Sections 1, 7, and 632, and it is conceded by petitioners that the District Courts and Supreme Court of Oklahoma have appellate jurisdiction over all such decisions of the County Court.

A probate proceeding under the laws of Oklahoma, as under the laws of other states of the Union, consists of a number of steps from the filing of the petition for administration or to probate a will, on to the final settlement of the estate, including any necessary construction of the will and the determination of heirs or devisees, and distribution of the estate. All of the steps are merely part of the same probate proceeding of which the County Court

has original jurisdiction, and the District and Supreme Courts of the State have appellate jurisdiction. The case of *Armstrong* v. *Letty*, 85 Okla. 205, 209 Pac. 168, and the cases following it, hold that the determination of whether or not the will of a full-blood Indian has been properly acknowledged and approved as required by the said acts of Congress is not a matter to be determined on the hearing of the petition to probate the will. The Supreme Court of Oklahoma had formerly held to the opposite view in the case of *Homer* v. *McCurtain*, 40 Okla. 406, 138 Pac. 807, which was overruled by *Armstrong* v. *Letty, supra.* There can be no doubt that the Supreme Court of Oklahoma was clothed with ample jurisdiction to make each of said rulings, and in the case of *Parnacher* v. *Mount*, likewise possessed jurisdiction to follow either line of decisions. Inasmuch as it is claimed that the construction of a federal statute is involved, petitioners could have appealed from the decision of the Supreme Court of Oklahoma to the Supreme Court of the United States, but they did not elect to do so and the decision of the Supreme Court of Oklahoma became final. *Angel* v. *Bullington, supra.*

Certainly in this proceeding, it cannot be said that the Oklahoma Supreme Court lacked jurisdiction because its decision on this point was not in harmony with former decisions of the same Court. It may be that the Oklahoma Supreme Court was convinced that it should return to its ruling in the case of *Homer* v. *McCurtain, supra,* or it may be that petitioners here—plaintiffs there—convinced the Court that the facts in this case created the necessity to make some exception to the rule laid down in *Armstrong*

v. *Letty*, and that the rights of the interested parties would be best protected by the determination at that stage of the proceeding, as to whether or not the will under consideration was or was not void by reason of the manner in which it was acknowledged and approved. Be that as it may, the Supreme Court of Oklahoma had jurisdiction of the subject matter, and of all the parties to that proceeding, and they are the same parties as in this proceeding.

We do not think that it is necessary, nor would it be appropriate at this time and place for us to take up time and space in defending or explaining the decision of the Supreme Court of Oklahoma in *Parnacher* v. *Mount*, 207 Okla. 275, 248 P.2d 1021, for it is immaterial for the purposes of *res judicata* whether or not the decision of the Oklahoma Supreme Court was erroneous. *Angel* v. *Bullington, supra.* It has been consistently held by this Court that: "A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause." *Baltimore, S. S. Co.* v. *Phillips*, 274 U.S. 316, 71 L. Ed. 1960, 47 Sup. Ct. 600; see also *Patterson* v. *Colorado*, 205 U.S. 454, 27 Sup. Ct. 556, 51 L. Ed. 879; *Bacon* v. *Texas*, 163 U.S. 207, 16 Sup. Ct. 1032, 41 L. Ed. 832.

> "Even if it be true, as the plaintiff in error says, that the Supreme Court of Colorado departed from earlier and well-established precedents to meet the exigencies of this case, whatever might be thought of the justice or wisdom of such a step, the Constitution of the United States is not infringed. It is unnecessary to lay down an absolute rule beyond the

possibility of exception. Exceptions have been held to exist. But, in general, the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the 14th Amendment merely because it is wrong or because earlier decisions are reversed."

—*Patterson* v. *Colorado, supra.*

"This court has no jurisdiction to review a judgment of a state court made under precisely the same circumstances, although such state court thereby decided that the state legislation was void which it had prior thereto held to be valid. * * * In other words, we have no jurisdiction, because a state court changes its views in regard to the proper construction of its state statute, although the effect of such judgment may be to impair the value of what the state court had before that held to be a valid contract."

—*Bacon* v. *Texas, supra.*

Point A-3

The decision of the Court of Appeals has not deprived petitioners of property without due process of law as suggested by petitioners at page 20 of the Petition for the Writ. The record in this case shows that the parties have been fully heard, as to the validity of the approval of the will of Liesiny Walton by the County Judge of Garvin County, Oklahoma, in the regular course of judicial proceedings in the County Court, the District, and the Supreme Court of the State of Oklahoma.

Although the judgment of the County Court of Pontotoc County, Oklahoma, is not shown wherein he passed on this question, it is shown in this record that petitioners,

in their contest, did raise the question (R. 77-79). It is shown by this record that this question was fully considered by the District Court of Pontotoc County, Oklahoma, by Finding of Fact VII (R. 83-84) and by Conclusion of Law VI (R. 85-86) both of which were excepted to by contestants—petitioners herein.

Petitioners, in their Petition for the Writ of Certiorari filed herein, at page 14 thereof, state that in the appeal in the Supreme Court of Oklahoma they "did assert that the will was void as to restricted property, and that it should *then* be declared to be void as to the restricted property, because not properly approved in accordance with the Act of Congress" (Emphasis ours). The reported decision of the Oklahoma Supreme Court, in *Parnacher* v. *Mount*, 207 Okla. 275, 248 P.2d 1021, shows conclusively that this question was therein fully litigated and carefully considered, and we believe its opinion indicates that it considered this question of prime importance, as it said:

> "Contestants submit five propositions in support of their contention that the will is invalid and should not have been admitted to probate. We shall first consider the contention that the will is void as to restricted property under Section 23 of the Act of April 26, 1906, 34 Stat. 137, 145, as amended by Section 8 of the Act of May 27, 1908, 35 Stat. 312, 315, which provides: * * *."

There it quotes the Act of Congress and carefully analyzes it. In the body of the opinion, it says:

> "We think the authority given to County Judges by the above Act is not such as to render the action of the

first one to whom a will is submitted final and binding upon all other County Judges in the State. * * *

"The will before us appears to have been properly executed, attested, and acknowledged before, and approved by, a County Judge of Oklahoma."

Its conclusion on this point is summed up in the first section of the syllabus by the Court as fully set out above in our statement of the case.

It thus definitely and unmistakably decides the exact question which petitioners are now asking this Court to decide. We think it decided the question correctly and that the reasoning by which it reached the decision stated in its first syllabus is sound, but regardless of whether the decision is correct or erroneous, it became final when not appealed to this Court, and petitioners have not been deprived of any property or right without due process of law.

"When the parties have been fully heard, in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property, without due process of law, within the 14th Amendment of the Constitution of the United States."

—*Central Land Company* v. *Laidley*, 159 U.S. 103, 112; 16 Sup. Ct. 80, 83; 40 L. Ed. 91;

Bristow Battery Co. v. *Board of Commissioners*, 37 F.2d 504, 507.

The decision of the Supreme Court of Oklahoma in the case of *Parnacher* v. *Mount*, *supra*, clearly constitutes *res judicata* as to the question of the validity of the ap-

proval of Liesiny Walton's will by the County Judge of Garvin County, Oklahoma, as exactly the same facts are involved and the same parties are parties to both proceedings. *Frost et al.* v. *Bankers Commercial Corp.*, 194 F.2d 505; *Williamson* v. *Columbia Gas & Electric Corp.*, 186 F.2d 464-467; *Lanham* v. *Howell*, 203 F.2d 361; *Angel* v. *Bullington*, 330 U.S. 183-192, 67 Sup. Ct. 657, 91 L. Ed. 832; *Troxell* v. *Del., L. & W. R. Co.*, 227 U.S. 434, 57 L. Ed. 586, *supra*.

Point B

Petitioners, at pages 46 and 47 of their brief in support of the Petition for the Writ, advance a highly technical theory as to whether or not the United States is bound by the judgment in the State Supreme Court, which theory has not been heretofore advanced or presented in any of the courts, either state or federal, wherein the controversy between these parties has been considered. Even if the theory could properly be presented for the first time in this Court, we do not feel that it is relevant or material to the question now before the Court as to whether or not the Writ of Certiorari should be granted. The question as to whether or not the United States is bound by the judgment in the state court or in the federal court has not been raised, and is not an issue in this case, and the determination of that question could throw no light on any question now before this Court.

The record before this Court does not disclose either that the Superintendent of the Five Civilized Tribes was or was not served with notice of the pendency of the pro-

ceeding to admit the will of Liesiny Walton to probate and administer her estate, and the statements at pages 46 and 47 of petitioners' brief might tend to leave the impression that no such notice was served on the Superintendent of the Five Civilized Tribes as provided for in Section 3-B of the Act of Congress of August 4, 1947, 61 Stat. 731. However, we cannot believe that counsel for petitioners intend to leave such an impression which would be entirely misleading and contrary to the real facts as the record before the Supreme Court of the State of Oklahoma, in the case of *Parnacher* v. *Mount, supra,* showed such notice in full and the service thereof on the Superintendent of the Five Civilized Tribes.

CONCLUSION

IT IS THEREFORE, RESPECTFULLY SUBMITTED that this case is not a proper one for review by Certiorari in this Court, and that the Petition for Writ of Certiorari should be denied.

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January, 1954.

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(the decree of distribution) could be conclusive on the United States and restricted Indian heirs, as to restricted property, as a determination that a will was an effective alienation of restricted Indian land, whereas the actual facts are that said proposition had been asserted in the Court of Appeals, and that Court failed to rule on the point, except insofar as it may have erroneously concluded that the order admitting the will to probate was a final judgment, and that the question as to whether the will could operate on restricted property was necessarily decided in determining whether the will should be admitted to probate, or the defendant appointed executor without bond as directed in the will ____ 2-3, 13

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No. 525

Supreme Court of the United States

OCTOBER TERM, 1953

NONLES PARNACHER, DEVET PARNACHER,
NANNIE PARNACHER, now JOHNSON,
and SALINA SCOTT,
Petitioners,

VERSUS

HOUSTON B. MOUNT,
Respondent.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Come now the petitioners, Nonles Parnacher, Devet Parnacher, Nannie Parnacher, now Johnson, and Salina Scott, and pray the Court for a rehearing on their petition for writ of certiorari in this case, and respectfully petition the Court to vacate and set aside the order made herein on the 8th day of March, 1954, denying their petition for certiorari, and to grant a rehearing thereon, and as grounds for this petition for rehearing allege that substantial grounds for the granting of certiorari, available to petitioners when said order was made, but not previously presented to this Court, exist in this case, as follows:

(1) There was no clear cut plea of *res adjudicata* or estoppel by judgment in the answer of respondent in the United States District Court, and respondent did not contend in the United States District Court in this case or in the Court of Appeals that the decision of the Supreme Court of Oklahoma, in the case of *Nonles Parnacher et al.* v. *Houston B. Mount*, 207 Okla. 275, 248 P.2d 1021, was conclusive by way of estoppel or *res adjudicata* as to the issues in this case.

(2) Under the law of Oklahoma, a judgment is not conclusive by way of estoppel as to a matter which was not within the issues presented by the pleadings, and the matter purportedly decided by the Supreme Court of Oklahoma in the first paragraph of its syllabus in the case of *Nonles Parnacher et al.* v. *Mount*, 207 Okla. 275, 248 P.2d 1021, was not within the issues framed by the pleadings in that proceeding.

(3) In the brief of respondent in opposition to the petition for writ of certiorari, filed in this Court, it was incorrectly asserted that it had not been claimed by petitioners in the Court of Appeals that under Section 3(b) of the Act of Congress of August 4, 1947 (61 Stat. 732), only the final judgment in a probate proceeding (the decree of distribution) could be conclusive on the United States and restricted Indian heirs, as to restricted property, as a determination that a will was an effective alienation of restricted Indian land, whereas the actual facts are that said proposition had been asserted in the Court of Appeals, and that Court failed to rule on the point, except insofar as it may have erroneously concluded that the order ad-

mitting the will to probate was a final judgment, and that the question as to whether the will could operate on restricted property was necessarily decided in determining whether the will should be admitted to probate, or the defendant appointed executor without bond as directed in the will.

ARGUMENT

First Proposition

(First Ground Above Stated)

In the District Court in this case the respondent did not actually contend that the decision of the Supreme Court of Oklahoma in the probate proceeding (*Parnacher* v. *Mount*, 207 Okla. 275, 248 P.2d 1021), was conclusive as to the issues in this case as an estoppel by judgment or under the doctrine of *res judicata*. In paragraph numbered 13 of plaintiffs' complaint, filed in this case April 17, 1952 (R. 7), it was, in part, alleged:

> "Plaintiffs allege that there has not been any final judgment in probate proceedings upon the estate of said allottee of said land which has precluded the plaintiffs from asserting that said will is void as to restricted property and allege that on the 11th day of March, 1949, the County Court of Pontotoc County, Oklahoma, in probate case numbered 4663 wherein the defendant herein had filed a petition for probate of said alleged will, rendered a judgment denying such petition and adjudging that said purported will was not entitled to be admitted to probate, and denying probate thereof, and that thereafter on an appeal, taken by the defendant herein from said order and judgment of the County Court of Pontotoc County,

Oklahoma, to the District Court of Pontotoc County, Oklahoma, in case numbered 19533 in the District Court of Pontotoc County, Oklahoma, said District Court of Pontotoc County, Oklahoma, on the 29th day of August, 1949, entered and rendered judgment that said order of the County Court be reversed, and that said purported will be admitted to probate, and plaintiffs further allege that from such judgment of the District Court of Pontotoc County, Oklahoma, they made an appeal to the Supreme Court of the State of Oklahoma which is now pending in case numbered 34531 in the Supreme Court of the State of Oklahoma on the question as to whether said purported will should be admitted to probate, and that said judgment of the District Court of Pontotoc County, Oklahoma, that it be admitted to probate is not final and was superseded during said appeal, * * *."

There was no affirmative plea of *res adjudicata* or estoppel by judgment in the answer of defendant in this case (R. 21). In paragraph numbered 12 of the answer it was said:

"As to paragraph numbered 13 of plaintiffs' complaint, defendant denies that there has been no final judgment in such proceedings which precludes the plaintiffs from asserting that said will is void, and alleges the facts to be that the proceedings to probate said will and appoint an executor filed in the County Court of Pontotoc County, Oklahoma, was appealed to the District Court of Pontotoc County, Oklahoma, and said district court ordered said will admitted to probate, an appeal was taken from the order of said District Court to the Supreme Court of Oklahoma, and the Supreme Court on the 25th day of March, 1952, affirmed the judgment of the District Court admitting said will to probate, and ordering the appointment of

defendant herein as executor; that petition for rehearing was filed in said Supreme Court by plaintiffs herein and said petition for rehearing was denied on September 30, 1952, and thereafter the Supreme Court refused to allow the filing of a second petition for rehearing, and on the 23rd day of October, 1952, issued mandate therein to the District Court of Pontotoc County, Oklahoma; that pursuant to the insistence of plaintiffs herein, through their counsel in the County Court and the District Court, and in their brief filed in the Supreme Court that the court in the proceedings now pending should determine whether or not said will had been approved in accordance with the Act of Congress of April 26, 1906, as amended by the Act of May 27, 1908, the said Supreme Court did in its opinion state, 'the will before us appears to have been properly executed, attested, and acknowledged before, and approved by, a County Judge of Oklahoma,' and said decision of the Supreme Court of Oklahoma has now become final" (R. 25).

Defendant's counsel did not assert that the requisites for a plea of estoppel by judgment of a decision on the merits within the triable issues actually litigated between the parties, which could be conclusive as to the issues in this case, had been rendered by the expression of opinion on the point in question by the Supreme Court of Oklahoma, and never actually contended that, and this was later admitted by them in the Court of Appeals. The petitioners could not be estopped by the decision of the Supreme Court of Oklahoma under the doctrine of estoppel by election of remedies, as that doctrine cannot apply in a case wherein there was no remedy in the particular proceeding before the Court as to the particular matter pur-

portedly decided, and, as shown by the quotation with approval by the Supreme Court of Oklahoma in *Parnacher* v. *Mount, supra,* from the opinion in *Armstrong* v. *Letty,* 85 Okla. 205, 209 Pac. 168, there was no remedy in that particular proceeding for petitioners' contention that the will was void as to restricted property under the Act of Congress. 28 C.J.S., Election of Remedies, Sec. 11, p. 1080; *Midland Savings & Loan Co.* v. *Tradesmen's Nat'l Bank* (10th Cir.), 57 F.2d 686, 693; *Tulsa Rig, Reel & Mfg. Co.* v. *Arnold,* 94 Okla. 120, 221 Pac. 19; *Ahrens* v. *Commercial Nat'l Bank,* 100 Okla. 250, 229 Pac. 287.

The defendant's counsel did contend in this case in the United States District Court that the Federal Court had no jurisdiction in this case because of Section 3(a) of the Act of Congress of August 4, 1947 (61 Stat. 732) (R. 15, 21), but that was obviously incorrect, as this suit was not a proceeding to probate or contest a will, or an administration proceeding, and this point was ruled against defendant (R. 20, 29, 67). *Ferguson* v. *Patterson* (10th Cir.), 191 F.2d 584.

When this case was orally argued in the Court of Appeals on September 9, 1953 (R. 93), the question as to whether anything said in the opinion of the Supreme Court of Oklahoma on the appeal from the order admitting the will to probate could be conclusive of the issues in this case under the doctrine of estoppel by judgment or *res adjudicata* had not been briefed, and respondent had not contended that it could have that effect, and the Court then directed that supplemental briefs be filed on the question (R. 93), and, in respondent's answer brief to supplemental brief of appellants in the Court of Appeals on this question,

it was admitted that respondent was making no contention that it could have that effect, and had not done so in the District Court, and in such brief, respondent's counsel in the Court of Appeals said:

> "We say that appellants have set up a straw man to tear down for the reason that we have never at any time, in our briefs or in argument to this court, or to the United States District Court, claimed that the opinion of the Supreme Court of Oklahoma, reported in 248 P.2d 1021, was *res adjudicata* as to any issue in this court * * *.
>
> "We cited in our brief the case of *Parnacher* v. *Mount*, 248 P.2d 1021, not because we thought it constituted a *res adjudicata* in this court, and not because we thought it worked an estoppel by judgment in this court, but because we believe that the reasoning of the Supreme Court of Oklahoma is sound, and constitutes a correct statement of the law to be applied to this case."

We realize these matters (as to the contents of the briefs filed in the Court of Appeals) are not now shown by the record in this Court, but believe that same probably could be made a part of the record in this Court, and ought to be considered by the Court, on this question, as the decision of the Court of Appeals, of which certiorari is sought for review, was based upon a point not even urged by respondent's counsel, and which they confessed was not applicable in this case.

Second Proposition

(Second Ground Above Stated)

Petitioners never pleaded in their contest against the probate of the will, filed in the Probate Court (R. 77), that the will was void as to restricted property, or had not been properly approved by an officer having jurisdiction to approve it, or that the will should be denied probate because not properly approved in accordance with the Act of Congress (Section 23 of Act of Congress of April 26, 1906, 34 Stat. 137, 145, as amended by Section 8 of Act of May 27, 1908, 35 Stat. 312, 315). The fact that the County Judge of Pontotoc County had refused to approve it when it was submitted to him for approval, and that respondent later secured the purported approval of the same will by the County Judge of Garvin County was mentioned in the contest (R. 78), not as a ground for contest of the probate of the will, but in attempting to plead facts showing that the will (not the approval) had been obtained by undue influence, a statutory ground of contest of probate of a will, under Section 41 of Title 58, Okla. Stat. Anno., as the fact that a will of a full-blood Indian is purportedly approved by an officer of the class designated in the Act of Congress may possibly be taken as some indication that there was no undue influence exercised in the obtaining of the will. It is settled law in Oklahoma that the fact that a will of a full-blood Indian is not approved or properly approved in accordance with said Act of Congress is not a ground for contest of the probate of the will, under the statutes of Oklahoma. *Phillips* v. *Smith*, 186 Okla. 636, 100 P.2d 249; *Armstrong* v. *Letty*,

85 Okla. 205, 209 Pac. 168; *Lauderdale* v. *Tookolo*, 114 Okla. 187, 243 Pac. 587. See article by A. W. Trice in Volume 16 at page 602 of the Oklahoma Bar Journal, published April 28, 1945, entitled: *Memorandum on Caesar* v. *Burgess*, discussing the case of *Caesar* v. *Burgess*, 103 F.2d 503, which article explains this clearly. Therefore, the issues in this case were not within the pleadings, or issues which could have been properly included in the pleadings, or litigated, in the proceeding for probate of the will in the state courts. It is obvious that this suit is not on the same cause of action as was presented in that proceeding. Therefore, the doctrine of *res judicata* does not apply. *United States* v. *International Building Co.*, 345 U.S. 502, 97 L. Ed. 1182, 73 Sup. Ct. 807; *Crockett* v. *Root*, 194 Okla. 3, 146 P.2d 555, and cases cited therein. The doctrine of estoppel by judgment cannot operate under Oklahoma law unless the matter was within the issues as tendered by the pleadings, and which could properly have been pleaded, in the former suit. The Supreme Court of Oklahoma said in its opinion in *Parnacher* v. *Mount*, *supra*, by its quotation with approval to that effect from *Armstrong* v. *Letty*, *supra*, that the point in question was not triable in that proceeding, for lack of jurisdiction in the original trial court to determine it. In such opinion, the Supreme Court of Oklahoma recognized that the matter was not within the triable issues within the jurisdiction of the trial courts in that proceeding, and that its opinion on the point could not be conclusive, by the following language, at page 1023 of 248 P.2d:

> "The will before us appears to have been properly executed, attested, and acknowledged before, and ap-

proved by, a County Judge of Oklahoma. In *Armstrong* v. *Letty*, 85 Okla. 205, 209 P. 168, it was said in the first syllabus:

" 'The approval and acknowledgment of the will of a full-blood Indian, required by Act Cong. April 26, 1906, sec. 23, as amended by Act Cong. May 27, 1908, sec. 8, is not an element of the execution and attestation contemplated by the statute of Oklahoma and is not within the purview of the jurisdiction of the county court in admitting a will to probate.'

"And in the body of that opinion it was said:

" 'This court has repeatedly held that the sole question involved, when a will is offered to the county court for probate, is the *factum* of the will. That is, has the will been executed and attested in the manner and form required by the statutes, and was the testator competent to make a will at the time he made it, and was he free from the disabilities which operate under our statute to defeat the will?'."

It is not within the power of an appellate court to conclusively decide a question on an appeal which was not in issue, and could not have been tried in the trial court, because of lack of jurisdiction. Any purported decision of such a point can have no more force than *dictum*. *In re Assessment of First National Bank of Chickasha*, 83 Okla. 233, 220 Pac. 909, 57 A.L.R. 890.

(The foregoing statement under this second proposition includes matter previously presented to this Court, but is a preface to the ground stated under the second proposition, which has not been previously presented.)

The purported decision of the Supreme Court of Oklahoma of the point expressed in the first paragraph of the

syllabus by the Court is void, just the same as if the point had been so decided in either of the trial courts in that proceeding, as under such Supreme Court's own statement, as above quoted from its opinion, there was no jurisdiction in the trial court in that proceeding to determine the question, and such purported decision of the point has the effect stated in the first paragraph of the syllabus by the Court in *Whitehead* v. *Bunch*, 134 Okla. 63, 272 Pac. 878, as follows:

> "In addition to jurisdiction of the parties and the subject-matter, it is necessary to the validity of the judgment that the court should have jurisdiction of the question which its judgment assumes to decide, and jurisdiction to render a judgment for the particular remedy or relief which the judgment undertakes to grant, and, where the court exceeds its jurisdiction and renders a particular judgment which it is wholly unauthorized to render, under such circumstances, such judgment is absolutely void, and subject to collateral attack."

In the case of *Henson* v. *Oklahoma State Bank*, 165 Okla. 1, 23 P.2d 709, it was held:

> "A judgment which is entirely outside the issues in the case and upon a matter not submitted to the court for its determination is a nullity * * *."

The rule is that a matter is not properly submitted to a court for its determination if it is outside the issues raised by the pleadings. *Hinkle* v. *Jones*, 180 Okla. 17, 66 P.2d 1073; *Henson* v. *Oklahoma State Bank, supra; Roth* v. *Union Nat'l Bank*, 58 Okla. 604, 160 Pac. 505, following *Reynolds* v. *Stockton*, 140 U.S. 265, 35 L. Ed. 464.

The facts which did develop in the probate proceeding concerning the manner in which the purported approval of the will was obtained were competent evidence on the issue as to whether the will (not the approval) had been obtained by undue influence, as it was competent to inquire on that issue as to everything which had been done with the will, both before and after it was executed.

The Supreme Court of Oklahoma, by its own statement in its opinion in *Parnacher* v. *Mount, supra,* as to the issues properly triable in a will contest proceeding, had no jurisdiction to conclusively determine the point expressed in the first paragraph of the syllabus by the Court.

Even if it could be said jurisdiction existed, it was a matter, which by reason of the nature of the proceeding, under the law of Oklahoma, could not have been adjudicated therein.

There is an error in a quotation from 50 C.J.S., Judgments, Section 731, page 222, at page 45 of petitioners' brief in support of their petition for certiorari, and it should read as follows:

> "A judgment is not conclusive on matters which were beyond the jurisdiction of the court *or* which by reason of the nature of the case could not have been adjudicated."

The opinion of the Supreme Court of Oklahoma in *Parnacher* v. *Mount* was filed March 25, 1952. Subsequent thereto and on April 1, 1952, the Supreme Court of Oklahoma decided the case of *In re Lamar's Estate,* 206 Okla. 244, 242 P.2d 727, and in it cited and followed *Armstrong* v. *Letty, supra,* and held that the sole question involved when a will is offered for probate is the factum of the will, and that other issues are not then triable.

Third Proposition

(Third Ground Above Stated)

At page 16 of the brief in response to petition for certiorari, the following statement was made:

> "Petitioners, at pages 46 and 47 of their brief in support of the Petition for the Writ, advance a highly technical theory as to whether or not the United States is bound by the judgment in the State Supreme Court, which theory has not been heretofore advanced or presented in any of the courts, either state or federal, wherein the controversy between these parties has been considered. Even if the theory could properly be presented *for the first time* in this Court, we do not feel that it is relevant or material to the question now before the Court as to whether or not the Writ of Certiorari should be granted."

Since respondent's attorneys made this assertion, petitioners believe they should be permitted to answer it. On October 11, 1953, counsel for petitioners (appellants) in the Court of Appeals served upon counsel for appellee in the Court of Appeals (respondent here) a supplement to their reply to the answer brief to appellants' supplemental brief on the question of the effect of the decision of the Supreme Court of Oklahoma in the probate proceeding, and, it was, by leave of court, filed in the Court of Appeals on October 13, 1953. In such supplement, the ground, for a holding that the decision of the Supreme Court of Oklahoma in the probate proceeding as to whether there had been a valid approval of the will under the Acts of Congress is not conclusive in this case, which is argued at pages 46 and 47 of petitioners' brief in support of their petition for certiorari, was presented and argued to the

Court of Appeals more fully than in the brief in support of petition for certiorari filed in this Court, and the Court of Appeals made no reference to such contention in its opinion, It was pointed out in such brief in the Court of Appeals that in *Armstrong* v. *Letty, supra,* the Supreme Court of Oklahoma had said:

> "A probate court in this state, having jurisdiction of the administration of an estate may, upon application, after legal notice, distribute an estate to the legal heirs as provided by the law of descent and distribution or according to the terms of a will, and such decree is an adjudication of the distributive shares of the heirs unless reversed on appeal. However, such a decree of distribution of Indian lands in this state would be subject to such limitation as the judgment of any other state court attempting to adjudicate title to restricted Indian Lands."

And the other matters set forth at pages 46 and 47 of petitioners' brief herein were argued in the Court of Appeals.

It is inconceivable that Congress, by Section 3(b) of the Act of August 4, 1947, 61 Stat. 732, intended to take away from the United States and its restricted Indian wards the right to attack a will of a full-blood Indian as a conveyance of restricted Indian land, where the requirements of the federal law had not been met, by suit in ejectment or to quiet title to the restricted property, after admission to probate of the will, and before the final judgment in the probate proceeding (the decree of distribution), in view of the fact that on the date of such Act of Congress it was clearly the law of Oklahoma that only the

final judgment (the decree of distribution) in a probate proceeding could possibly have the effect of an adjudication that the will was effective as an alienation of restricted property *(Armstrong* v. *Letty, supra).* It is clear that such an effect was guarded against by the language in the statute differing from the language in Section 3 of the Act of Congress of April 12, 1926 (44 Stat. 239), and providing that only the *final* judgment in a probate proceeding should bind the United States and the parties thereto to the same extent as though no Indian property or question were involved, even where the notice provided for therein is served.

That the purported decision of the point in the first paragraph of the syllabus by the Supreme Court of Oklahoma in *Parnacher* v. *Mount, supra,* is no more binding on the plaintiffs herein than it would be on the United States Government, if it was attempting herein to protect the rights of these plaintiffs, see *Neal* v. *Travelers Insurance Co.,* 188 Okla. 131, 106 P.2d 811, and the cases cited by Judge Kennamer in *Mashunkashey* v. *Clinton,* 11 F. Supp. 456, for his holding that the Indian plaintiffs in that case could maintain the action, although the United States as guardian for restricted Indians could also have maintained the action, to-wit: *United States* v. *Equitable Trust Co.,* 283 U.S. 738, 51 Sup. Ct. 639, 75 L. Ed. 1379; *Barnett* v. *Equitable Trust Co.,* 34 F.2d 916.

CONCLUSION

It is therefore respectfully submitted that a rehearing should be granted in this case and the petition for certiorari to review the decision of the Court of Appeals be granted.

Respectfully submitted,

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March, 1954.

CERTIFICATE OF COUNSEL

The foregoing petition for rehearing is filed pursuant to paragraph 2 of Rule 33 of the Rules of the Supreme Court of the United States, and is confined to substantial grounds available to petitioners heretofore, although not previously presented, and is presented in good faith and not for delay, and is restricted to the grounds above specified.

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Counsel for Petitioners,

March, 1954.